



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 12 OF 2014 (OS)

IN THE MATTER OF SECTION 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 LAND PARCEL KNOWN AS NANDI/CHEBILAT/129

BETWEEN

RAPHAEL KAGALI MUHINDI.....PLAINTIFF

VERSUS

MARY JEROTICH MISOI.....DEFENDANT

JUDGMENT

By an originating summons dated 17th January 2014 and amended on 16th February 2018 the plaintiff herein sued the defendant claiming that he had acquired 0.83 Hectares comprised in the land parcel known as **NANDI/CHEBILAT/129** which measures 3.8 Hectares by way of adverse possession and sought the court's determination of the following questions:

- a) Whether the plaintiff has been in open, continuous, and uninterrupted occupation of 0.83 Hectares of land parcel known as **NANDI/CHEBILAT/129**.
- b) Whether the occupation has been without the consent of the defendants
- c) Whether the 1st defendant's title to the land has been extinguished by adverse possession.
- d) Whether the land should be subdivided to hive off 0.83 Hectares for the plaintiff.
- e) Whether the plaintiff is entitled to be registered as the proprietor of 0.83 Hectares within the land parcel known as NANDI/CHEBILAT/129 in place of the 1st defendant.
- f) Whether the 2nd defendant should execute a discharge of charge in respect of the 0.83 Hectares of land to be registered in the plaintiff's name.
- g) Whether in default of the defendants 'complying with the above the Deputy Registrar of the Honourable Court may execute the requisite instruments.
- h) Who should meet the costs of this suit.

The plaintiff **RAPHAEL KAGALI MUHINDI** swore a supporting affidavit wherein he deponed that the defendant is the registered proprietor of the land parcel known as **NANDI/CHEBILAT/129** which measures 3.8 Hectares.

The plaintiff further averred that defendant became registered on 25th June 1977 and on 17th August, 1995 he acquired an interest in the suit

land and entered into occupation. He deponed that he has remained in occupation of the 0.83 Hectares which is comprised in the suit land since the said date and still continues to be in occupation and that the period of 12 years has since lapsed since he took occupation. He deponed that the defendant's title to the suit land lapsed in the year 2007 by virtue of adverse possession.

The court gave directions that the matter proceeds by way of viva voce evidence

PLAINTIFF'S CASE

PW1 gave evidence and stated that the defendant is the registered proprietor of the land parcel known as NANDI/CHEBILAT/ 129 measuring 3.8 Hectares and that based on the certified extract of the register of the said land parcel she became registered on the 25th June, 1977.

It was PW1's evidence that on 17th August, 1995 he acquired an interest in the land and entered into occupation of 0.83 Hectares comprised in the said land and still remains to date and produced a sale agreement to support the same.

PW1 also produced a copy of a sketch plan of the location to show the occupied indicated as B. It was his evidence that he had been in occupation for a period of over 12 years hence the defendant's title to the portion of 0.83 Hectares had been extinguished by virtue of adverse possession as the defendant had not taken steps towards evicting him.

PW1 therefore urged the court to find that he is in adverse possession and order that he be registered as the owner of the suit property in place of the defendant of the 0.83 Hectares. He further stated that at the time the land was used as security in the year 1996, he had already taken occupation and constructed a house thereon and he thus prayed that the summons be allowed.

PW 2 Japheth Lihanda gave evidence that he was a witness to the agreement between the plaintiff and the defendant and that the parties were neighbors. It was further his evidence that the plaintiff has been in occupation of the suit land since 1995.

PW3 Kiptoo Kogo also gave evidence and stated that he was a witness to the agreement between the plaintiff and the defendant as a village elder. He further testified that the plaintiff has lived on the land without any issues or interruptions from the defendant. He had never had the defendant demanding that the plaintiff vacates.

DEFENDANT'S CASE

In response to the summons the defendant swore a replying affidavit wherein she stated that she is the registered owner of all that parcel of land known as **NANDI/CHEBILAT/129** and has a Title Deed to that effect. She stated that the suit has been brought in bad faith with intent to grab her land not bought and or sold to the Applicant

The defendant averred that she sold 0.4 acres to the Applicant and is in occupation and possession of those 0.4 acres and that the Applicant has not been in occupation and possession of 0.83 Ha. of **NANDI/CHEBILAT/129** but only 0.4 acres which he bought. She further averred that Limitation period has not expired as the last instalment was paid not more than 12 years ago since the limitation period started running 6 months after the said last instalment was paid

DW1 stated that she had a dispute with the plaintiff 2 or 3 years before the institution of this suit thus the plaintiff could not claim to have been in peaceful occupation of the land. Further that the sketch placed before the court was undated, unsigned, unapproved and thus not reliable.

DW1 testified that the land has not been surveyed and that the plaintiff had rented 0.2 acres which he wanted to occupy by force. DW1 stated that he was ready to sub — divide and transfer 0.4 acres sold to the plaintiff though he has been unable to meet the costs of the survey and transfer.

PLAINTIFF'S SUBMISSIONS

Counsel submitted that the entry of the plaintiff into the land is not disputed as having been on 17th August, 1995 and that the defendant confirmed that the said occupation was well within her knowledge.

Counsel cited the case of Kimani **Ruchite v Swift Rutherfords (1980) KLR 10** where it was held that in adverse possession;

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

Further in the case of **Mwangi Gitau v Livingstone Ndeete, (1980) eKLR** 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, 3rd edition, at page 252:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). 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.”

Mr Mogambi submitted that allegations by the defendant that the occupation has not been peaceful are not justified as there is no evidence for any interruption or interference. That it is on record that the defendant has supported the plaintiff’s claim by offering to transfer 0.4 acres instead of 0.83 Hectares.

Counsel relied on the case of **Joseph Gachumi Kiritu v Lawrence Munyambu Kabure (1996) eKLR** where the court held;

“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.”

Counsel further relied on the provisions of section 30 (f) of the Registered Land Act, Cap. 300 (repealed) and now in section 28 (h) of the Land Registration Act, 2012 which recognize adverse possession as an overriding interest and sought that in the alternative the court can make a finding that the defendant holds the 0.83 Hectares of land as a trustee for the plaintiff as there is no basis as to why the defendant is only offering 0.4 acres when he sold 0.83 acres.

Mr Mogambi also cited the case of Macharia **Mwangi Maina & 87 Others v Davidson Mwangi Kagiri, (2014) eKLR** where the court held that;

“It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots.”

Further in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** where the court held that:

“The doctrines of equity are part of our laws although Section 3 of the Judicature Act subordinates common law and the doctrines of equity to the Constitution and written law in that order. Sections 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust.”

Counsel also relied on the case of Peter **Mbiri Michuki v Samuel Mugo Michuki (2014) eKLR** where the court held that :

“It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the Limitation of Actions Act applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the Limitation of Actions Act applies as it provides that 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.”

Counsel therefore urged the court to find that the plaintiff has proved adverse possession hence the orders should be granted as prayed.

DEFENDANT’S SUBMISSIONS

Counsel reiterated the evidence of the parties and relied on the provisions of Sec. 38(1) of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules, 2010 requires that an Order of adverse possession can only be made against a Respondent who is a registered owner.

Counsel relied on the **Wambugu vs Niuguna (1983) KLR 173** where the Court of Appeal held as follows:

"for an order to acquire by the statute of limitation title land which has a known owner that owner must have rights to the land either by being disposed of it or by having discontinued his possession of it. Dispossession of the Proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose which he intended to use it. The proper way of assessing proof of adverse possession would then 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 has been in possession of the requisite number of years"

Counsel submitted that at the time of acquisition of the property, the same was charged to KCB Bank and that for a party to succeed in an action for adverse possession, he or she must demonstrate that the occupation of the property has been actual, open, hostile and continuous possession of the exclusion of the true owner for a period of over 12 years.

Mr. Choge relied on the case of **Sammy Likuvi Adiema vs Charles Shannvati Shishikani (2014)eKLR** where the Court held that that parties are bound by their pleadings and that any evidence led by any party which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings must be disregarded.

Counsel also relied on the case of **Kasure vs Allvaani Investments Ltd vs 4 Others (2004) I KLR 184** and **Nzamate Wandozu –vs- Esther Vioki Kibunja (2013) eKLR** to support the defendants case.

Mr. Choge cited the case of **Ahmed Abdulkarim & Another vs Members for Land and Mines & Another, Civil Appeals [1958] EA** where it was observed that the limitation period shall not begin to run unless the true owner, is aware of that someone else is in possession and is holding it adversely to himself.

Counsel therefore urged the court to dismiss the plaintiff's case with costs to the defendant.

ANALYSIS AND DETERMINATION

The issues for determination in a claim for adverse possession are well settled. Has the plaintiff proved the elements of adverse possession and in this case where the defendant is claiming that the plaintiff is only entitled to 0.4 Hectares and not 0.83 Hectares, the court will have to ascertain the acreage that the plaintiff is occupying in adverse to the defendant's title.

It is not in dispute that the defendant is the registered proprietor of land known as **NANDI/CHEBILAT/129** measuring 3.8 Hectares having been so registered on 25th June, 1977. It is further not in dispute that the plaintiff bought a portion of the said property on 17th August, 1995 and entered into occupation, what is in dispute is the acreage that the plaintiff in occupation of.

The plaintiff produced the sale agreement and witnesses who testified also confirmed this fact and that the plaintiff completed payment of the purchase price on 10th October, 1999 and that is the date that time began running for purposes of adverse possession.

It is on record that defendant has partly admitted the fact that he sold the property but the acreage is the issue as the defendant insists the portion sold was 0.4 acres whereas the plaintiff alleges that he bought 0.83 acres of the property and has been in occupation of the said parcel.

Section 7 of the Limitation of Actions Act, (Cap 22) provides that :

‘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 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.

For one to succeed in a claim of Adverse Possession, (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

“Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

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.”

The onus is on the person claiming Adverse Possession:

“.. 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”

Further in the case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of

Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

In the case of **Mtana Lewa v Kahindi Nala Mwangandi [2015]eKLR** the court summed up adverse possession as:

“... 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 tendered it is evident that the plaintiff and the defendant entered into a sale agreement for a portion of land measuring 0.83 on 17th August, 1995 and he has been in possession of the suit property from then to date and has constructed a house among other structures on the said property.

As per the evidence on record, the payment of the last instalment of the purchase price was paid on 10th October, 1999 and that is when time started counting for purposes of adverse possession.

In the case of **Wanyoike –Vs- Kahiri (1979) KLR** it was held that;

“In a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase price.”

Further in the case of **Wambugu –Vs- Njuguna (1983) KLR** where the Court stated that;

“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchase pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated.”

In the case of **Harrison Oyari & 588 Others –Vs- Mareo Oriambu & 22 Others (2016) eKLR**, the Court stated that;

“Time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the Certificate of Title, for that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land.”

There is evidence that the plaintiff paid the purchase price in full and the last payment was made on 10th October 1999 which date the time for purposes of adverse possession started running. This period is also beyond the 12-year period.

This is a unique case where the defendant in her evidence admitted that the plaintiff had bought land and is ready to transfer 0.4 acres instead of the acreage of 0.83 Hectares that they entered into an agreement with the plaintiff. The defendant also confirmed that the only challenge he is facing is money for the subdivision and transfer.

I have considered the pleadings the evidence by both parties and the relevant authorities and find that the

plaintiff has proved his claim for adverse possession and is therefore allowed as prayed with costs.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF JUNE, 2021

M. A. ODENY

JUDGE