



**REPUBLIC OF KENYA**

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

**ELC NO. 301 OF 2015**

**WALTER KIPCHIRCHIR KOECH.....APPLICANT**

**VERSUS**

**TAPNYOBII W/O MELIL.....1<sup>ST</sup> RESPONDENT**

**JONATHAN KIBYEGON CHERUIYOT.....2<sup>ND</sup> RSPONDENT**

**JUDGEMENT**

1. By an Originating Summons amended on the 12<sup>th</sup> April 2019, the Applicant herein who claims to be entitled to be registered as the sole and absolute proprietor, **by adverse possession**, to 2<sup>1</sup>/<sub>2</sub>.acres of land, to be excised from LR No. Kericho/Chemagel/1785 seeks for the determination of the following questions:

- i. Whether or not the Applicant and the Respondents entered into a sale agreement in August 1979 to which the Respondents had sold a portion of land measuring 2<sup>1</sup>/<sub>2</sub>.acres comprised in LR No. Kericho/Chemagel/1785 registered in the names of the 1<sup>st</sup> Respondent at an agreed purchase price of Ksh 5,500/=
- ii. Whether or not after the Applicant purchased the said portion, got into possession, occupied the same and undertook developments to wit, fencing, planting trees and rearing livestock.
- iii. Whether or not the Respondents applied for and obtained consent to subdivide and transfer at the relevant Land Control Board with a view of transferring the portion measuring 2 ½ acres to the Applicant.
- iv. Whether or not the Applicant has been in peaceful, quiet possession and use of the said portion uninterrupted since 1979, without the Respondents' consent.
- v. Whether or not the Respondents have caused any interruption with the peaceful occupation of the Applicant on the suit land.
- vi. Whether or not the Applicant has acquired title to the said 2 ½ acres comprised in LR No. Kericho/Chemagel/1785, registered in the names of the 1<sup>st</sup> Respondent by adverse possession, having been in quiet possession and exclusive use of it or a period of over 12 years.

2. The Originating Summons was premised on the Supporting *Affidavit* sworn on the 12<sup>th</sup> April 2019 by Walter Kipchirchir Koech the Applicant herein.

3. Despite the Respondents' having been granted leave, on various occasions, to respond to the original and subsequent amended Originating Summons, they failed to do so and so the court on the 26<sup>th</sup> February 2020 set the matter down for hearing with a rider that the Respondents respond and serve before the hearing date. This was not done

4. On the 1<sup>st</sup> February 2021 the court observed that it was clear that the matter had been filed way back in the year 2007 wherein the Respondents had not been keen to have the same proceed for hearing despite having been granted several adjournments to put their house in order. The Court opined that Justice did not wait for the indolent and proceeded to direct for the matter to proceed for hearing as undefended. The Respondent's Counsel then confirmed that he would only cross-examine the Applicant.

5. The Applicant, Walter Kipchirchir Koech testified as PW1 to the effect that he was a farmer who lived in Soimet within Bomet County and relied on his recorded statement as his evidence to testify that he wished to be registered as the owner of 2 ½ acres of land comprised of Kericho/Chemagel/1785, land which was registered to the 1<sup>st</sup> Respondent, Tapnyobi wife of Melil.

6. That he had bought the 2 ½ acres of the land from the 1<sup>st</sup> Respondent in the year 1975 wherein they had entered into a sale agreement dated the 3<sup>rd</sup> November 1975, between himself and the 2<sup>nd</sup> Respondent Jonathan Kipyegon Cheruiyot who was the 1<sup>st</sup> Respondent's son. The agreement, which at the time, had been only for 1 acre of land, had been executed before Kositany Advocate

7. His evidence was that on the 11<sup>th</sup> August 1979, they had entered into another agreement between himself and the 1<sup>st</sup> Respondent wherein she had sold to him another land measuring 1 ½ acres making it a total of 2 ½ acres. That Applicant's case was that the 1<sup>st</sup> Respondent had allowed her son Jonathan to sell the land because thereafter, she had allowed him (Applicant) to take possession and occupy the same.

8. He confirmed that he did not get consent from the Land Control Board but that he took possession of the 1 acre of the land in the year 1975 wherein in the year 1979, he took possession of the other 1 ½ acres. That he now was in possession of the 2 ½ acres which he had since developed by planting trees, cultivating part of it, and had left the other part for grazing of his animals.

9. It was his evidence that he had not built a house on the 2 ½ acres of land as the same was situated next to his land for which reason he had just decided to develop it. He proceeded to testify that he had never been interrupted by the Respondent or her agents but had lived peacefully on the said land for more than 40 years. He sought for the court to declare him as its owner.

10. He then produced as exhibits:

- i. Copies of agreement dated 3<sup>rd</sup> November 1975 as Pf Exh 1.
- ii. A copy of the extract of title to Kericho/Chemagel/1785 as Pf Exh 2.
- iii. Digital photographs showing development on the land as Pf Exh 3 (a-f).
- iv. A hand written agreement dated 11<sup>th</sup> August 1979 as Pf Exh 4.

11. On cross-examination, the Applicant confirmed that he had had another case on the same parcel of land with the 1<sup>st</sup> Respondent in Kericho No. 43/2006 which case had been finalized but which did not involve 1 acre of land. He was categorical that he did not want the whole parcel of land, but only his share of 2 ½ acres.

12. He also confirmed that he did not know the whole acreage of the 1<sup>st</sup> Respondent's parcel of land, but confirmed that she resided on the same and he resided on his own land which was different from the suit land.

13. He also concede that he did not mention the present case in the previous case No. 43/of 2006 because he had been advised by Counsel not to seek adverse possession then.

14. He confirmed that the agreement of 3<sup>rd</sup> November 1975 had been drafted as between him and the 2<sup>nd</sup> Respondent because the 1<sup>st</sup> Respondent had not been around. That although the registration of the land had been in the 1<sup>st</sup> Respondent's, name yet she had consented to the sale of land to him by the 2<sup>nd</sup> Respondent. The Applicant further confirmed that the 2<sup>nd</sup> Respondent being an only son to the 1<sup>st</sup> Respondent, had not showed him any Power of Attorney at the time of the sale.

15. His evidence was that at the time they were entering the agreement, the land had not been subdivided and the original number of the suit land before sub-division was Plot No. 604. That after subdivision, there had resulted Plots No. 1785 and 1786 to which Plot No. 1785 was registered to the 1<sup>st</sup> Respondent and Plot No. 1786 to himself.

16. He reiterated that he had been in possession of the parcel of land comprised in Plot No 1785 for 40 years and that it had not been true that matters before Court had been adjudicated upon in the previous case No. 43/2006. That further it was not true that he had leased the land that he was now claiming.

17. When referred to Pf exh 1, he confirmed that the same neither depicted the acreage of the land he had bought, nor did it mention the 1<sup>st</sup> Respondent, but he went on to confirm that the 2<sup>nd</sup> Respondent had drafted the agreement.

18. On re-examination, the Applicant confirmed that the 1<sup>st</sup> Respondent had thump printed on Pf Ex 4 but that there was no reference to the acreage of land. That despite this, he was seeking for 2 ½ acres, 1 acre which he bought from the 2<sup>nd</sup> Respondent, and 1½ acres which he bought from the 1<sup>st</sup> Respondent, land which had previously been registered as Kericho/Chemagel/604 before subdivision.

19. His evidence in re-examination was that he had been the Plaintiff in the previous case No. 43 of 2006 wherein he had secured an injunction against the 1<sup>st</sup> Respondent in respect to parcel No. Kericho/Chemagel/1786 which he had bought from the 1<sup>st</sup> Respondent. He confirmed to having bought land from the 1<sup>st</sup> Respondent 3 times and that Land No. 1786 had a title deed.

20. At the close of the Applicant's case, the Respondents offered no defence wherein parties were directed to file their submissions.

#### **Applicant's submissions.**

21. The Applicant's submission was to the effect that although the Respondents had been served with the amended Originating Summons

together with the witness statements and documents on 24<sup>th</sup> April 2019, they had only filed their Notice of Appointment of Advocates but had failed to file either their response, defence or objections to the Originating Summons which remained uncontroverted in the circumstance.

22. The Applicant framed his issues for determination as follows;

- i. Whether or not the Applicant purchased 2 ½ acres of land comprised in Kericho/Chemagel/1785 from the Respondent.
- ii. Whether the Applicant has been in peaceful, quiet and uninterrupted occupation and use of a portion of land measuring 2½ acres comprised in Kericho/Chemagel/1785 for more than 12 years and thus acquired it by adverse possession.

23. On the first issue for determination, the Applicant submitted that on 3<sup>rd</sup> November 1975, he had purchased 1½ acres of land from the 1<sup>st</sup> Respondent through her son the 2<sup>nd</sup> Respondent wherein on the 11<sup>th</sup> August 1979, he had purchased another 1 acre from the 2<sup>nd</sup> Respondent, both parcels of land comprised Kericho/Chemagel/605. That this evidence was not materially contradicted.

24. That although the sale agreement of 3<sup>rd</sup> November 1975 had been entered into by the 1<sup>st</sup> Respondent's son, the 2<sup>nd</sup> Respondent herein, yet the fact that he had been put into actual occupation and possession of the land by the 1<sup>st</sup> Respondent, it signified that she had consented and/or permitted her son to draw the agreement on her behalf. That thereafter he had been in continuous, quiet, peaceful and uninterrupted occupation of the use of 2 ½ acres of the land comprised in Kericho/Chemagel/1785 for a period of more than 40 years.

25. That the Respondents having failed to controvert his evidence was an assumption that they had admitted his case. Reliance was placed on the case of **Coftea Machinery Services Limited vs Akiba Bank Limited & 2 Others [2004] eKLR**.

26. In reference to the second issue for determination, the Applicant's submission was that upon the purchase of the parcel of land, the 1<sup>st</sup> Respondent had given him vacant possession and use of the said portion first in the year 1975 and subsequently for the second piece of land in the year 1979 wherein he had proceeded to fence it, plant eucalyptus trees, which had now matured, and the remaining parcel of land he had used for cultivation and grazing his livestock as depicted in the photographs produced as Pf Exh 3 (a-f).

27. That the 1<sup>st</sup> Respondent did not apply for consent from the Land Control Board for transaction within the six months stipulated under Section 6(1) of the Land Control Act thus making both the sale agreements null and void. That having taken possession and occupation of 2 ½ acres of land with the permission of the 1<sup>st</sup> Respondent upon the sale agreement, the transaction had become null and void for lack of consent but because he continued to remain in quiet, peaceful and uninterrupted possession of the suit land without permission and consent of the owner, this now was a clear case of being in adverse possession. Reliance was placed on the decided case of **Ruth Wangari Muigai vs Edward Njuguna Mwangi [2015] eKLR**.

28. The Applicant submitted that although it had emerged during the trial that he had previously filed Kericho ELC No 43 of 2006 against the 1<sup>st</sup> Respondent, that the subject suit in the previous case had been LR No. Kericho/Chemagel/1786 which had subsequently been registered in his name. He submitted that since he had proved his case against the 1<sup>st</sup> Respondent on a balance of probability, that he be granted the prayers sought in his amended Originating Summons of the 12<sup>th</sup> April 2019.

#### **Respondent's submissions.**

29. In response and in opposition to the Applicant's Originating Summons, the Respondents herein confirmed to not filing any response to counter the Applicant's claim but framed their issues for determination as follows;

- i. Is the Respondent the registered owner of land parcel Kericho/Chemagel/1785?
- ii. Did the Respondent enter into sale agreement for sale of 1 ½ acres from land parcel Kericho/Chemagel/1785.
- iii. Did the sale transaction obtain the Land Control Board Consent
- iv. Whether the Applicant was allowed to take possession.
- v. Whether in the absence off the Land Control Board Consent the Applicant has obtained title through adverse possession.
- vi. Who pays the costs?

30. On the first and second issues for determination which were combined, the Respondents conceded that indeed Kericho/Chemagel/1785 was registered to the 1<sup>st</sup> Respondent and that the same was a subdivision of Kericho/Chemagel/604.

31. That although the Applicant's evidence was that he had bought the resultant sub division of Kericho/Chemagel/604 being Kericho/Chemagel/1786, yet he had not produced any evidence of proof.

32. The Respondent also attacked the sale agreements of 3<sup>rd</sup> November 1975 and 11<sup>th</sup> August 1979 to the effect that they did not specify the land parcel, which was a subject matter of the same and therefore it doubtful whether the parties were signing the agreement in relation to what later became land parcel Kericho/Chemagel/1786 or whether the same was in relation to land parcel Kericho/Chemagel/1785. That

further the sale agreement dated 3<sup>rd</sup> November 1975 was between the Applicant and the 2<sup>nd</sup> Respondent who had no capacity to transact. Both agreements thereof did not meet the set standard required for the sale of land and therefore the Applicant failed to discharge his standard of proof.

33. On the third issue for determination, it was the Respondents' submission that after the sale agreement and parties having failed to obtain consent from the Land Control Board, the said transaction became null and void, was invalid and unenforceable in law.

34. On the fourth issue for determination, the Respondents submitted that the doctrine of adverse possession was not in favor of the Applicant because the sale agreement had not been rescinded and/or terminated by the 1<sup>st</sup> Respondent and therefore the Applicant has been in possession of the land with consent of the 1<sup>st</sup> Respondent which did not qualify to be adverse against the 1<sup>st</sup> Respondent. Reliance was placed on the decided case in **Isaac Maobe Okeri vs Magero Naosi alias Mante Okeri [2016] eKLR**.

35. The Respondents further submitted that the Applicant's suit was frivolous, an abuse of the court process, was unsustainable and therefore the same ought to be dismissed with costs.

#### **Determination.**

36. The court is mindful of 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) in these terms:

*“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 is first accrued to some person through whom he claims, to that person”.*

37. Section 13 of the Act is in these terms:

*“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”*

38. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

39. The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:**

*“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.”*

40. The onus is on the person or persons 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 Applicant s must show that the company 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”*

41. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

42. Now in order to find out whether the Applicant herein demonstrated the said elements, it is trite as stated herein above, that 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. See **Littledale vs Liverpool College (1900)1 Ch.19, 21**.

43. This being a matter where the Applicant has sought for orders that he be registered as proprietor of 2<sup>1/2</sup> acres of land to be excised from LR No. Kericho/Chemagel/1785 having acquired title by virtue of the doctrine of adverse possession, I find the issues arising for my determination as being:

- i. Whether adverse possession may arise out of a sale agreement;

ii. When does time begin to run in favour of the purchaser who has taken possession?

iii. Whether the Applicant has acquired title by way of adverse possession to 2<sup>1</sup>/<sub>2</sub> acres of land to be excised from LR No. Kericho/Chemagel/1785.

44. I have considered the evidence on record, as well as the fact that the Respondents herein did not defend the case. I have also considered the applicable law on the doctrine of Adverse Possession. Briefly the Applicant's undefended case was that Kericho/Chemagel/604 was land registered to the 1<sup>st</sup> Respondent wherein before its sub division, he had initially bought 1 acre piece of land and another 1½ acres subsequently, land which was to be excised from Kericho/Chemagel/604.

45. That on 3<sup>rd</sup> November 1975, he had entered into a sale agreement between himself and the 2<sup>nd</sup> Respondent Jonathan Kipyegon Cheruiyot who was the 1<sup>st</sup> Respondent's son, for the sale of 1 acre of land. The agreement had been executed before Kositany Advocate and he took possession of the 1 acre of the land in the year 1975. That later in the year 1979, he bought an additional 1½ acre of land from the 1<sup>st</sup> Respondent wherein they had entered into a second sale agreement on the 11<sup>th</sup> August 1979 and he took possession of the second piece of land making it a total of 2 ½ acres.

46. It was the Applicant's case that subsequently Kericho/Chemagel/604 was subdivided into 2 resulting into LR No. Kericho/Chemagel/1785 and LR No. Kericho/Chemagel/1786. That **land parcel No. 1786 measuring 1 acre was transferred into his name and thereafter he had filed, with success** Kericho ELC No. 43 of 2006 against the 1<sup>st</sup> Respondent seeking that she (1<sup>st</sup> Respondent) be *permanently restrained from his land*. See **Walter Kipchirchir Koech v Tapnyobii Melil [2016] eKLR**.

47. The Applicant's case was that the other 1 ½ acres was contained in LR No. Kericho/Chemagel/1785 registered in the Respondent's name. That although there had been no consent sought from the Land Control Board, yet he had been and was still living peacefully on the said land to date wherein he had developed it land by planting trees, cultivating part of it and using the other part to keep his livestock.

48. The Applicant's case was that the 1<sup>st</sup> Respondent's conduct of allowing him take possession and occupation of the 2 ½ acres was evident enough that the 2<sup>nd</sup> Respondent, although not the proprietor of the land, had the 1<sup>st</sup> Respondent's consent to sell the same. The Applicant's case further is that there being lack of consent from the Land Control Board, the sale of the 2 ½ acres of land had become void ab initio and he could therefore claim adverse possession of the land.

49. The Respondents did not adduce any evidence but filed their submissions to the effect that the Applicant did not adduce evidence that he had bought land to be excised from Kericho/Chemagel/605. That the sale agreements of 3<sup>rd</sup> November 1975 and 11<sup>th</sup> August 1979 did not specify the land parcel and therefore the same were doubtful. That further, the sale agreement dated 3<sup>rd</sup> November 1975 was between the Applicant and the 2<sup>nd</sup> Respondent who had no capacity to transact. In summation, both agreements did not meet the set standard required for sale of land.

50. The Respondent further submitted that the sale transactions having failed to obtain consent from the Land Control Board, and also having not been rescinded and/or terminated by the Respondent, the same became null and void, was invalid and unenforceable in law and therefore the doctrine of adverse possession could not be in favor of the Applicant.

51. It is trite law that submissions are not strictly speaking evidence, but they are a way in which Counsel or sometimes parties themselves, crystallize the substance of the case, evidence and the law relating to that case as a way to attract the court's attention on the main aspects of the case, which would affect its outcome.

52. Indeed the Court of Appeal in **Daniel Toroitch Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR** held that;

*“Submissions cannot take the place of evidence. The 1<sup>st</sup> Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”*

53. It is therefore in this regard that a judgment cannot be based on written submissions since they are not a mode of receiving evidence as set out under Order 18 Rule 2 of the Civil Procedure Rules. The Respondents failed to defend the case through evidence and submissions would therefore not come to their aid. See the court of Appeal decision in **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997**.

54. I have considered the Applicant's exhibits herein produced as Pf exh 1-4 and I find that indeed it is not in doubt that Kericho/Chemagel/1785 was registered to the 1<sup>st</sup> Respondent on the 15<sup>th</sup> September 1977 wherein she was issued with the title 14<sup>th</sup> October 1977. It is also clear that the Applicant herein instituted this suit on the 24<sup>th</sup> July 2007. According to the rule on adverse possession, a party claiming must have been in possession for over 12 years. Indeed in the case of **Kimani Ruchine & Another -vs- Swift Rutherford & Company Ltd and Another(1980) KLR 10**, it was held for example that where cultivation of land is advanced to support the claim to adverse possession, the evidence of the cultivation must be definite as to the area and time. The Applicant has laid claim to 2 ½ acres of land to be excised from Kericho/Chemagel/1785 and has produced photographs as Pf exh 3 (a-f) in support of the developments made therein.

55. The Respondents have refuted the Applicant's claim by submitting that although the Applicant took possession of the impugned parcel of land through sale agreements, subsequently both agreements having not received consents from the Land Control Board, and having not been

rescinded and/or terminated by the 1<sup>st</sup> Respondent, become null and void. That the Applicant was thus in occupation of the impugned parcel of land by permission of the 1<sup>st</sup> Respondent and therefore adverse possession did not accrue to him.

56. I wish to dislodge this line of thought, indeed adverse possession is a process wherein all that the Applicant had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years. Although the 1<sup>st</sup> Respondent is the proprietor of the suit land, the Applicant has been in possession and actual occupation of it for over twelve years and so he has rights acquired under the Limitation of Actions Act which is an over-riding interest that does not have to be entered into the register.

57. What the land control legislation prohibits without consent is an agreement, a transaction or a dealing in agricultural land which comes about as a result of a volitional act between parties themselves. The ownership of land of whatever type is thus muted by operation of law to the effect that provisions of the Land Control Act have no application where the claim to title of agricultural land is by operation of law such as by adverse possession as it is not an agreement, a transaction or a dealing in agricultural land.

58. Indeed the Court of Appeal in **Public Trustee v Wanduru Ndegwa [1984] eKLR** held as follows:

*‘A transaction as envisaged under section 6 of the Land Control Act (cap 302) is a voluntary act, which adverse possession is not. The Land Control Act did not, in my view, apply to Beatrice Muthoni’s claim and so it was irrelevant whether or not the consent of the Land Control Board was sought and/or obtained. Time started running the day the appellant and her late husband took possession of the suit land and that was March 16, 1967 for that was the date the Respondent’s possession was discontinued. Twelve years had expired by the time this suit was filed in April 1979..... The twelve years’ period under section 7 of the Limitation of Actions Act is not whittled by the Land Control Act’.*

59. In the present case, the Applicant took possession of the suit lands in the years 1975 and 1979 respectively as a purchaser, pending compliance with the requisite statutory formalities. The 1<sup>st</sup> Respondent allowed him to stay there by accident or design and allowed matters to drift on without taking steps to evict the Applicant from the land after the contract failed on account of non-completion with legal requirements. In the process, she lost her rights to the land when the agreement of sale between the parties became void and she was subsequently disposed of the land in a manner that was hostile to her enjoyment when the Applicant went ahead to take possession and develop it as earlier on stated for a period spurning more than 40 years.

60. In conclusion, I find that Applicant has, on balance of probabilities proven possession and continuous use of the suit land for more than 12 years, contrary to the Respondents’ use and has made up a case for being granted the orders sought. The amended Originating Summons of 12<sup>th</sup> April 2019 is allowed with costs as prayed.

**DATED AND DELIVERED AT KERICHO THIS 29TH DAY OF JULY 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**