



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 84 OF 2016

FRED MAOGA NYAMBARORA.....PLAINTIFF

VERSUS

PETER KIPKURUI LANGAT.....DEFENDANT

JUDGMENT

INTRODUCTION

1. On **30/9/2019** the court directed that the Originating Summons and all supporting affidavits be treated as a plaint, that the replying affidavit filed in reply to the Originating Summons shall be treated as the defence and that the matter should proceed as though commenced by way of plaint and by way of *viva voce* evidence.

2. In the Originating Summons, the plaintiff seeks the orders against the defendant to the effect that he has obtained title by way of adverse possession over the whole of **Land Reference Number Trans Nzoia/Kiptoi/156**, having been in uninterrupted possession of the same since **1992** upto **3/12/1996** the suit land having been initially as **Parcel Number Trans Nzoia/Kiptoi/49**, that the respondent's title over land reference number **Trans Nzoia/Kiptoi/156** has been extinguished by dint of adverse possession and all the Limitation of Actions Act, that **Land Reference Number Trans Nzoia/Kiptoi/156** be transferred by the respondent to the applicant, that a vesting order do issue vesting **Land Reference Number Trans Nzoia/Kiptoi/156** to the applicant; that the respondent be ordered to transfer **Land Reference Number Trans Nzoia/Kiptoi/156** to the applicant failing which the Deputy Registrar of the Honourable Court do execute the documents necessary to effect a transfer into the applicant's name and that the Registrar of Lands Trans Nzoia County do issue a fresh title deed in the name of the applicant and costs.

PLEADINGS

The Plaint

3. In his claim, the plaintiff averred that he entered into land purchase agreements with the defendant over land known as **LR Trans Nzoia/Kiptoi/49** in **1992** and **1994**; that

The Defence

4. The defendant filed his replying affidavit dated **18/4/2019** on **5/3/2020**. He admitted to being the paper title owner of the suit land; however he contended that the plaintiff is merely a licensee on the suit land having asked for temporary accommodation thereon in **1996** as he sought a place of his own; that in breach of trust the plaintiff later refused to vacate when he was asked to do so. He denied having sold the suit land to the plaintiff and termed the agreements as a forgery.

The Plaintiff's Supplementary Affidavit

5. The plaintiff also filed a supplementary affidavit dated **12/3/2020** on **13/3/2020**. He denied being a licensee living on the suit land with the defendant's permission and maintained that he was a purchaser. He stated that he has never been evicted from the suit land.

The Plaintiff's Evidence

6. **PW1, Fred Maoga Nyambarora**, the plaintiff, testified on **17/5/2021**. He adopted his witness statement, affidavits and the attachments dated **8/4/2019** as his evidence-in-chief in this case. He stated that the defendant sold him a plot measuring **50 feet by 100 feet** in **1992**, and later sold him one acre in **1994**; that the defendant never took him to the land control board within **6 months** of the agreements; that the suit land is now referred to as **Land Reference Number Trans Nzoia/Kiptoi/156**; that he has never parted with possession of the suit land; that he utilizes the land openly and without the defendant's consent and also without any disturbance by any person.

7. When cross-examined by Mr Khisa for the defendant the plaintiff stated that the portions he purchased had no titles by the time of the agreements and that it is possible that their total size could be less than one acre in size; he admitted to knowing the defendant's wife known by the name "Anna" or "Ruth"; he stated that subdivision of the main parcel of land occurred in **1996** and all other persons who had bought land from the defendant got their titles; that he went to the land control board in **1998** and thus prompted the summoning of the defendant to the board but the summons were in vain.

8. Upon re-examination by Mr. Momanyi he stated that the land that he purchased is comprised in **Land Reference Number TRANS NZOIA/KIPTOI/156** and that his claim is in respect of the whole of that parcel. He also stated that he is also claiming the plot in another case that is **Kitale ELC No 124 of 2015**. He produced documents in evidence to support his claim.

9. **PW2, Stephen Oreri Onguso**, testified on the same date as **PW1**. He adopted his witness statement dated **8/4/2019** as his evidence-in-chief in this suit. His evidence is that the plaintiff has been in continuous occupation and exclusive use of the suit land since **1994** which he has developed extensively by planting trees which have now matured and that he has also constructed houses thereon. He stated that the defendant has never been in occupation of the suit land since **1994**.

10. **PW3, Joash Okemwa**, testified on the same date as **PW1**. He adopted his witness statement dated **8/4/2019** as his evidence-in-chief in this suit. His evidence was the same as that of **PW2**.

The Defendant's Evidence

11. **DW1, Peter Kipkurui**, the defendant, testified on **17/5/2021** His evidence is that he is the registered proprietor of land formerly known as **Plot No 49-Kiptoi**; that it was more than **30 acres**; that he sold much of that land; that he was left with **0.9 acres** which bears the **title number 156**; that its title was processed in **1998**; that the plaintiff lives on the said plot; that in **1996** the plaintiff asked for a small plot of less than one acre on which to grow vegetables and then went to the land control board saying that he had purchased the land; that the defendant did not sign the agreements produced in court by the plaintiff; that the said agreements are fake; that the plaintiff placed a caution on the suit land and failed to attend when summoned by the land registrar; and that he prays for an eviction order against the plaintiff.

SUBMISSIONS

12. The plaintiff filed his submissions on **3/6/2021**. I have perused the court file and I have found no submissions filed by the defendant.

DETERMINATION

Issues for determination

13. I have considered the plaint, the evidence, the submissions as well as the documents produced in this case. The **3** main issues for determination in this matter are:

(a) Were there sale agreements entered into by the plaintiff and the defendant in respect of the suit land as alleged by the plaintiff?

(b) Is the plaintiff entitled to the suit land by virtue of adverse possession?

(b) What Orders should issue as to costs?

14. The issues are addressed as here below:-

(a) Were there sale agreements entered into by the plaintiff and the defendant in respect of the suit land as alleged by the plaintiff?

15. The agreements the plaintiff relies on were produced as **PEXh 1** and **PEXh 2**. **PEXh 1** is a hand written document dated **27/4/1992** in respect of sale of a plot of **50 by 100 feet** for **Ksh 10,000/=** out of **Plot No 49 Kiptoi**. It is signed by the seller who is the defendant herein and the buyer who is the plaintiff herein in the presence of the seller's wife who acted as the witness. It acknowledges the full payment of the purchase price.

16. **PEXh 2** is a sale agreement between the plaintiff and the defendant dated **3/4/1994** for sale to the plaintiff of one acre of land out of **Plot No 49 Kiptoi**. It is a rudimentary, hand filled sale agreement form. On its face it is however evident that one acre was being sold to the plaintiff for **Ksh 33,000/=**. The defendant's wife is named as the witness thereon.

17. The defendant's only challenge to **PEXh 1** and **PEXh 2** was that they are forgeries. He stated, which I find it hard to believe, that he came to know of the said agreements on the day of the hearing. That can not be the case since their copies were exhibited in the supporting affidavit in the originating motion. Besides, he had occasion to seek expert evidence since the lodging of the claim to prove that the agreements were forgeries. However he never availed any evidence to the effect that the signatures on the said agreements were not affixed thereon by him and his wife. Besides, he has admitted that the plaintiff has been in quiet and uninterrupted occupation of the suit land since **1996**. The lengthy stay on the suit land corroborates the plaintiff's claim that the agreements were executed by the defendant and witnessed by his wife. I therefore find that the agreements produced as **PEXh 1 and PEXh 2** are genuine.

(c) Is the plaintiff entitled to the suit land by virtue of adverse possession?

18. For the plaintiff to establish his claim in adverse possession, in occupation of the suit land *nec vim, nec clam nec precario*, that is, occupation without force, permission or secrecy.

19. The defendant by his own admission has stated that the plaintiff entered the suit land in **1996**, albeit he maintains that the plaintiff's original entry onto the suit land was as a licensee. The finding above that the agreements produced as **PExh 1** and **PExh 2** are genuine dispel the notion that the plaintiff entered the land as a licensee. There is no good reason given by the defendant as to why he would allow a licensee to enter land and remain thereon and develop it as extensively as the plaintiff has demonstrated he has done. In this court's view lengthy occupation of the suit land by the plaintiff has been demonstrated. The defendant never demonstrated that the plaintiff has ever parted with possession of the land at any time since **1996**. Also, the plaintiff stated that the defendant has never evicted him from the land and that he has enjoyed open, public and quiet possession of the same. I have no doubt that the plaintiff has by his evidence established that he has been in occupation of the suit land *nec vim, nec clam, nec precario*. He is therefore entitled to be registered as proprietor of the suit land under the doctrine of adverse possession.

(c) What Orders should issue as to costs?

20. The defendant opposed the suit and failed to disprove the plaintiff's claims. The plaintiff has established his claim against the defendant according to the required standard and he is therefore entitled to costs from the defendant.

Conclusion.

21. I have found that the plaintiff has established his claim against the defendant on a balance of probabilities. I therefore enter judgment in the plaintiff's favour against the defendant and I issue orders as follows:

a. A declaration that the plaintiff has obtained title by way of adverse possession over the whole of LR No. TRANS NZOIA/KIPTOI/156;

b. A declaration that the defendant holds title over LR No. TRANS NZOIA/KIPTOI/156 in trust for the plaintiff;

c. An order that the trust in (c) above is hereby determined and LR No. TRANS NZOIA/KIPTOI/156 shall be transferred by the defendant to the plaintiff within 30 days hereof and in default the Deputy Registrar of this court shall execute all the necessary documents to effect such transfer of the said land to the plaintiff upon which event the Registrar of Lands Trans Nzoia County shall issue a fresh title deed over LR No. TRANS NZOIA/KIPTOI/156 in the name of the applicant.

d. An order that the defendant shall bear the costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJOROGI

JUDGE, ELC