



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO. 79 OF 2018.**

**NELLY JERUTO KIPLAGAT.....APPLICANT**

**VERSUS**

**MANUBHAI DAHYABHAI TAILOR.....RESPONDENT**

**JUDGMENT**

The applicant NELLY JERUTO KIPLAGAT filed an originating summons dated 8<sup>th</sup> May, 2018 and claimed to be the owner of the parcel of land known as ELDORET MUNICIPALITY BLOCK 5/184 for orders and determination of the following questions.

1. Whether or not the applicant is the legal owner of the parcel of land known as ELDORET MUNICIPALITY BLOCK 5/184 by virtue of adverse possession.
2. Whether or not the Applicant is in actual possession and has been in actual possession for over 12 years and has the intention to possess ELDORET MUNICIPALITY BLOCK 5/184.
3. Whether the applicant was aware of the Applicant's entry into the land without title.
4. Whether the rights and interests of the respondents I respect of the said parcel of land ELDORET MUNICIPALITY BLOCK 5/184 got extinguished on the expiry of 12 years after the Applicant's entry.
5. Whether the Applicant should be declared the owner of the said parcel of land by way of adverse possession.
6. Whether the suit parcel should be registered in the Applicant's name and title issued to her.

The respondent was served with the summons but did not file any response therefore the matter proceeded ex parte after proof that the respondent was duly served with a hearing notice.

**APPLICANT'S CASE**

It was the applicant's case that she has been in occupation of the suit land continuously, peacefully and uninterrupted since 1980 to date with the knowledge of the respondent. She stated that she has made substantive developments on the parcel of land and intends to retain it and or possess it as the respondent's rights over suit parcel of land have lapsed and gotten extinguished upon the expiry of 12 years of the applicant's occupation and possession.

The applicant stated that she has demonstrated her interests in the land and her intention to possess it due to the massive developments thereon and therefore the land be registered in her name to have the interests protected. It was further her evidence that land parcel number ELDORET MUNICIPALITY BLOCK 5/184 is registered in the name of the respondent, however, she has resided, occupied and possessed the suit land uninterrupted for a period of 35 years.

The applicant also stated that the respondent is aware of her existence and possession of the suit land for all these years and has neither laid claim over the suit land nor attempted to evict her or interrupt her possession. That the suit plot was given to her brother and has built a servant quarter on the suit land and that she has been paying electricity and land rates. She produced a bundle of receipts for payment of land rent as pexbt 2a to 2d, land rates certificate as pexbt 3a, a chief's later as pexbt 4. She therefore urged the court to find that she has acquired the suit plot by adverse possession.

## ANALYSIS AND DETERMINATION

I have considered the pleadings, the evidence and the submissions of counsel and find that the issues for determination are as to whether the plaintiff has proved the ingredients of adverse possession.

A party claiming adverse possession ought to prove that the possession is without force, without secrecy and without the authority or permission of the owner of the said property for over 12 years.

In order to establish this, a party has to demonstrate exclusive possession, adverse rights of the title owner and the intention to possess it. 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 is by operation of the law and 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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which 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.”***

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** 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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”***

**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 37** provides that: -

***“ (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”***

According to Halbury's Laws of England, 4<sup>th</sup> Edition Volume 28, paragraph 768.

***“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”***

The Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR** held that:

***“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”***

The plaintiff must show that she has been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

The plaintiff has stated that she has been in occupation of the suit property for a period of over 35 years which is a period of over 12 years. She also stated that she has been in occupation and possession of the suit property openly and continuously and without interruption for all that period and that she has carried out extensive developments of the suit land.

The respondent did not tender any evidence to contradict the plaintiffs' averments. The plaintiff produced a copy of the transfer (exhibit 1) copies of land rent payment receipts (exhibit 2) confirming that the property is registered in the respondent's names.

From the pleadings and the evidence adduced together with the legal principles on adverse possession, I find that the plaintiff has proved her case on a balance of probability and has met the threshold required to be declared an adverse possessor. I therefore grant the plaintiff the orders as prayed in the originating summons plus costs.

**DATED and DELIVERED at ELDORET this 13<sup>TH</sup> DAY OF FEBRUARY, 2020**

***M. A. ODENY***

***JUDGE***

**JUDGMENT** read in open court in the presence of Mr.Kipruto holding brief for Mr.Mukhabane for the Plaintiff and in the absence of the Defendant.

Mr. Yator – Court Assistant