



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CIVIL SUIT NO. 30 OF 2014 (O.S)
IN THE MATTER OF LAND PARCEL KERICHO/KAPSUSER/782
IN THE MATTER OF CIVIL PROCEDURE ACT AND RULES MADE THEREUNDER
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
IN THE MATTER OF ENVIRONMENT AND LAND ACT 2011
AND
IN THE MATTER OF THE LAND REGISTRATION ACT, 2012
IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION
BETWEEN
KIMITEI ARAP TONU.....APPLICANT
VERSUS
GRACE CHEBET TONU
(Sued as the legal representative
of the estate of the late
WILLY KIKWAI TONU.....RESPONDENT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit by way of Originating Summons dated 2/07/2014 seeking a determination of the following questions:

a) Whether the plaintiff ought to be declared the registered owner by way of adverse possession of the whole of land parcel KERICHO/KAPSUSER/782 which he alleged to have had peaceful and uninterrupted occupation of for over 12 years.

b) Whether the title in respect of the said parcel of land currently in the name of the Defendant ought to be cancelled and another one issued in the name of the Plaintiff

2. In support of his claim the Plaintiff filed an Affidavit sworn on 2/7/2014 and a further affidavit sworn on the 2/5/2015. In the said affidavit the Plaintiff deposes that he purchased the suit land from the late Kibengat Arap Tonui in 1958 and has been in occupation thereof since then and made substantial improvements thereon.

3. He further deposes that he had the suit land registered in the name of his deceased brother who was the Defendant's husband to enable him a loan from Barclays Bank of Kenya. He deposes that he subsequently repaid the loan and had the title discharged after which he sold the

land to one Kenneth Kiplangat. In the Further affidavit, he depones that the Defendant has never occupied the suit land since he bought it though he states that he stayed thereon with his late brother Willy Kikwai Tonui while the said brother was in school.

4. The Defendant refutes the Plaintiff's claim though her Replying Affidavit sworn on the 20th May 2015 in which affidavit she depones in paragraph 2 thereof that the Plaintiff neither purchased the subject parcel of land nor has he been in peaceful occupation of the suit land for uninterrupted period of 12 years to justify the grant or orders sought in the originating summons. She depones that the Plaintiff filed this suit after the she obtained a Confirmation of Grant in respect of her late husband's estate.

5. She states that the suit land was registered in her late husband's name on 29th September 1971 after which he charged it to Barclays Bank to secure a loan of Kshs. 3000. She depones that the mere fact that the Plaintiff repaid the said loan does not entitle him to the suit property.

6. The court directed the that the suit be canvassed by way of viva voce evidence and the O.S and Supporting Affidavit were deemed as the Plaintiff whereas the Replying Affidavit was deemed as the Defence. The suit was subsequently set down for hearing and both parties testified and called witnesses.

Plaintiff's Case

7. The Plaintiff **Kimitei Arap Tonui** who testified as PW1 stated that he purchased the suit land in the 1958 from one Kibengat Arap Tonui. He further stated that he stayed in the suit land until 1970 when he moved to Mulot, and that he continues to plough it up to date. It was his testimony that his absence during the adjudication process was the reason why the suit land was registered in the name of his brother **Willy Kikwai Tonui**. He also stated that his brother used the title deed to secure a loan which he was unable to pay and after repaying the loan the title was given to him. According to him his brother did not own any land because he used to live in a rented house. He further stated that his late brother never stayed in the suit land during his lifetime.

8. In cross-examination, he admitted that he was currently not in occupation of the suit land. He also confirmed that he had sold the suit land to one **Kenneth Kiplangat Siele** after the demise of his mother who had been staying on the suit land. He also admitted that his attempts to cause the suit land to be registered in the name of **Kenneth Kiplangat Siele** were opposed the by Defendant. He further admitted that attempts by elders to resolve the issue were resisted by the Defendant's son. He confirmed that the first time elders advised the parties herein to resolve the dispute at home and further attempts to resolve the dispute were disrupted by the deceased's son. He admitted that the suit herein was filed on 2/7/2014 after the Defendant had obtained grant of letters of administration on 4/2/2014.

9. PW2 **Kiprono Bengat** testified in support of the plaintiff's case and stated that his father Kibengat Arap Tonui sold the suit land to the Plaintiff in 1958. He stated that the Plaintiff paid the purchase price both in cash and in kind. He stated that he was given a bicycle as part of the purchase price. He stated that the Plaintiff stayed on the suit land for many years after which he moved to Mulot.

10. In cross examination, he admitted that his father sold the suit land when he was away. He could not explain why the title was not in the Plaintiff's name. He stated that the Plaintiff stayed on the suit land with his mother for more than five years. He admitted that the Plaintiff was no longer in occupation of the suit land and it was currently occupied by a person called Arap Waler.

11. **Margaret Anita Omulo**, the Land Registrar, Kericho testified as PW3. She produced a copy of the green card as Plaintiff's exhibit-1 and explained entries No. 1 to 7 in the proprietorship section. She stated that the suit land was first registered on 29.9.1970 in the name of Kikwai A. Tonui. It was subsequently registered in the name of Kenneth Kiplangat Siele in the year 2000 but the said registration was reversed pursuant to an Objection filed by the Defendant. The title was then registered in the Defendant's name on 28.3.2014 to hold it in trust for her children after she obtained a grant in Succession Cause No. 9 of 1996.

12. In cross-examination she enumerated the documents that must be presented at the time of transfer of land. These include:

- (a) Consent of Land Control Board
- (b) Transfer forms
- (c) Passport photo
- (d) Pin certificate
- (e) Copy of Identity Card

13. She confirmed that even though the above-mentioned documents were presented by the Plaintiff to transfer the suit land to Kenneth Kiplangat Siele, the transfer was not signed because the transferee- Kimitei Arap Tonui was not the registered owner of the suit land.

14. According to her the entries on the register revealed that there were attempts to have the suit land transferred.

15. After the close of the Plaintiff's case the Defendant testified and called one witness to testify in support of her case.

Defendant's Case

16. The Defendant **Grace Chebet Tonui** testified as DW1. In her testimony, she stated that her late husband Willy Kikwai Tonui bought the suit land from Tamatch Arap Tonui and in support of her averments, she produced a sale agreement dated 13th December 1967 as Defence

Exhibit-1. She also produced a copy of certificate of official search as Defence Exhibit-2 to prove that the suit land is indeed registered in the names of her deceased's husband. She stated that the Plaintiff petitioned for Grant of Letters of Administration intestate for the estate of her late husband and when she applied for revocation of the Grant, the court issued her with a certificate of confirmation of Grant which certificate she produced as Defence Exhibit-3.

17. According to her the suit land was purchased by her husband and the same ought to be registered in her name.

18. The Defendant stated that a meeting was convened to resolve the dispute between her and the Plaintiff and in support of her averments she produced a copy of letter by the chief dated 27.12.1995 as Defence Exhibit-4. It was her testimony that two other meetings to resolve the land dispute was convened on 27/11/2010 and 8/12/2010 and minutes of the two meetings were produced as Defence exhibit-5 and Exhibit 6 respectively.

19. According to the Defendant, she stayed on the suit land with her husband and after the demise of her husband she moved to another piece of land. She stated that she continued to use the suit land herein for grazing and farming upto the time when the Plaintiff brought in someone to stay on the suit land. According to her, the Plaintiff has never lived on the suit land and neither did he cultivate nor build a house thereon since he lives in Mulot.

20. In cross-examination, the Defendant stated that the Plaintiff's stay on the suit land after the demise of her husband was intermittent. She stated that she did not agree with resolutions of the meeting convened on 27.12.1995.

21. **Lawrence Kipkoech Keter** who testified as DW 2 stated that the suit land was bought by Willy Kikwai Tonui in the year 1967. He thereafter took possession of the suit land. He stated that the plaintiff was a carpenter and he used to pay visits to his brother from time to time whenever he had work to do within that area.

22. According to him the Plaintiff did not construct a house on the suit land. He further stated that the Plaintiff left in the 1970s after selling the land to Edwin Ngetich who was then a D.O in Makueni. Later the land was sold to Kenneth Siele who is the current occupant thereof. He stated that the issue was reported by the Defendant to the chief and a meeting was convened on 27.11.2010 but no resolution was reached during the meeting since the Plaintiff became hostile. Another meeting of members of the clan was convened on 8.12.2010 but the Plaintiff once again became hostile and disrupted the meeting which ended in disarray. According to him the Plaintiff's stay on the suit land has not been peaceful. His stay on the suit land has been intermittent and therefore he has no claim and the land as it belongs to the Respondent's husband.

Issues for determination

23. Arising from the pleadings, evidence and rival submissions, the only issue for determination is whether the Plaintiff is entitled to be registered as the owner of land parcel KERICHO/KAPSUSER/782 by virtue of adverse possession.

Analysis and determination

24. Section 13 of the Limitation of Actions Act provides as follows:

“A right of action to recover land does not accrue unless the land 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), and where under section 9, 10, 11 and 12 of this Act a right of action to recovery 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”.

25. Section 38(1) of the Act states as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”

26. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

*“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, **Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184** and **Wanje v Saikwa (2) (supra)**. In the first decision, the court was emphatic that 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 and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.*

What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

27. In the case of **Kimani Ruchine V Swift Rutherfords & Co Ltd (1980) KLR 10** the court held as follows:

“The plaintiffs have to prove that they used this land which they claim as of right; *nec vi, nec clam, nec precario* (no force, no secrecy no force, no evasion). So the company 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 endeavours to interrupt it by any recurrent consideration; See Wanyoike Gathure V Beverly (1965 EA 514, 518 and 519 per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together, see sections 9(1), and 13 of the Limitation of Actions Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner of the land enjoys it. Also if enjoyment and use are not possible (see generally paragraphs 481, 482 on pages 251 and 252 24 Halsbury's Laws of England 3rd Edition.”

28. The principles that can be gleaned from the above authorities are as follows:

1. One must demonstrate that he has been in continuous and uninterrupted possession without the consent of the owner of the land for a period of at least 12 years.
2. The person's interests must be inconsistent with the interests of the land owner.
3. The possession must be open and notorious to enable the owner to be on notice that there is a trespasser on his land.
4. Possession has to be actual to enable the owner have a cause of action which if he fails to act within the required legal period then he will be estopped by the Law of Limitation to claim back the land.
5. Possession has to be exclusive to avoid confusion as to who is entitled to the suit land once the limitation period lapses.

29. In the instant case Plaintiff claims to have bought the land and taken possession thereof from 1958 to 1970 or thereabouts when he moved to Mulot. He claims that the only reason that the suit land was registered in the name of his late brother Willy Kikwai Tonui is because he was away during the process of adjudication. He did not produce any sale agreement to show that indeed he bought the suit land. Furthermore, his evidence has been rebutted by the Defendant who claims the land was purchased by her late husband in 1967 and registered in his name in 1970. She produced a sale agreement and green card to prove this. There are two problems here; firstly, why would the Plaintiff claim to have been in adverse possession of land which ought to belong to him by virtue of purchase? Secondly, even assuming that he was in adverse possession from 1958 to 1970, against whom was time running? Certainly not the Defendant or her late husband as he only became registered as the owner of the suit land in 1970 and he died in 1973.

30. There is no evidence on record that the Plaintiff's interests were inconsistent with the land owner. In fact his evidence is that he permitted the late brother to register the land in his own name so that the brother could charge the title to Barclays Bank as security for a loan. He also alludes to having stayed on the land with his late brother and he later on visited his mother on the said land.

31. The fact that the Plaintiff alleges to have stayed on the land in the belief that he had bought it, means that his possession of the land was not adverse to that of the registered owner as he cannot be equated to a “trespasser”.

32. It is not clear from the evidence if the Plaintiff's possession was actual since it is on record that he moved to Mulot in 1970 and he has no house on the suit land. The meetings that were held in 1995 and 2010 to resolve the dispute between the Plaintiff and the Defendant over the suit land are not relevant as they did not address the question of possession.

33. Lastly, the Plaintiff's possession was not exclusive as he testified that his mother was staying on the suit land before she died.

34. The fact the Plaintiff purported to sell the suit land to one Kenneth Kiplangat Siele before having the title registered in his own name is also telling.

35. From the foregoing it is clear that the evidence on record does not support a claim for adverse possession. The upshot is that Plaintiff has failed to prove his case on a balance of probabilities and I therefore dismiss it. Since this is a case between family members, each party shall bear his own costs.

Dated, signed and delivered at Kericho this 1st day of February, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Koech for the Defendant.
2. Mr. Migiro for Miss Sitati for the Plaintiff.
3. Court Assistant- Wambany