REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 312 OF 2017

(Formerly Nairobi ELC Case No. 1148 of 2014 – OS)

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012

IN THE MATTER OF: THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

IN THE MATTER OF: CIVIL PROCEDURE ACT AND RULES ENACTED THEREUNDER

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE APPLICANT HAS OBTAINED OWNERSHIP OF KAJIADO/ KITENGELA/ 6689 MEASURING FOUR DECIMAL ZERO FOUR SEVEN (4.07) HA. BY WAY OF ADVERSE POSSESSION

BETWEEN

DUNCAN SHUMPA NGATET.....1ST PLAINTIFF/ APPLICANT

SIMON MUSIKA NGATET.....2ND PLAINTIFF/APPLICANT

AND

STONE MASTERS LIMITED.....DEFENDANT/ RESPONDENT

JUDGMENT

By an Originating Summons dated 11th August, 2014and filed on 26th August, 2014, the Applicants seek for the following Orders:

1. Are the Plaintiffs/ Applicants entitled to be declared as the proprietor of 4.047 Ha or thereabout of land being plot number KAJIADO/ KITENGELA/ 6689 or subdivisions emanating therefrom?

2. Are the Plaintiffs/Applicants entitled to be registered as the owner of Plot KAJIADO/ KITENGELA/ 6689 or subdivisions emanating therefrom?

3. If the answer to 1&2 is yes, A declaration that Plot KAJIADO/ KITENGELA/ 6689 and or subdivisions emanating therefrom belongs to the Applicants by reason of adverse possession and an order be issued to Land Registrar to register the Applicants as joint owners of plot number 6689.

4. Are the Plaintiffs/ Applicants entitled to the costs of this suit.

The Respondent opposed the Originating Summons and filed a replying affidavit sworn by ANTHONY SUGE the Senior Legal Officer where he confirms that in the year 1995/1996 the Respondent purchased the suit land from one Ntapaiya Ole Turere which property was a subdivision from Kajiado/ Ololoitikoshi/ Kitengela/ 1623. Further, that Ntapaiya Ole Turere is the father to the Applicants. He contends that the Respondents have been in full control of the suit land since the year of purchase and denies in totality the Applicants' averments. He explains that the suit land was charged informally to Victoria Commercial Bank in 1996. Further, in 1998 squatters invaded the suit land and illegally took possession of the same, culminating in Victoria Commercial Bank registering a caution thereon. He claims the squatters were eventually evicted by the Respondent and the caution subsequently withdrawn in 2011. He insists the Respondent has been undertaking stone mining business on the suit land. Further, that the Applicants averment that they have been grazing their livestock on the suit land is incorrect as the same is rocky with no grazing land or grassland to be utilised by livestock. He reiterates that the Applicants have not been in

continuous and uninterrupted possession of the suit land and have failed to annex evidence to support their assertions that they carry out stone mining activities including business on suit land.

Evidence of the Applicants

The Applicants testified that the Respondent purchased the suit land from their late father. They claimed to have utilized the suit land from 1998 for quarrying purposes as well as grazing their animals. It was PW1's testimony that no one had tried to remove them from the suit land. Further, that the Respondent had never visited the suit land from 1998 todate. PW1 however confirmed that the Respondent initially undertook stone mining on the suit land after it had purchased it but abandoned the same. They reiterated that they have openly and uninterruptedly used the suit land for their stone mining business and grazing. They produced pictures and copy of Green Card as exhibits

Evidence of the Respondent

The Defendant claims to have bought the suit land in 1996 from the Applicants' father. Further, after purchase they used it for quarrying purposes but stopped due to lack of a license. It avers that it charged the suit land to Victoria Commercial Bank. Further, in 1998 the said land was invaded by Squatters and the Bank lodged a caution against the title. In 2011 the squatters moved away. It disputes the Applicants' claim and insists the suit land is rocky and can only be used for quarrying purposes but not agriculture. It produced a copy of title as exhibit.

The parties filed their respective submissions

Analysis and Determination

Upon consideration of the parties' pleadings herein, including testimonies of the witnesses, exhibits and submissions, the following are the issues for determination:

- Whether the Applicants have acquired the suit land KAJIADO/ KITENGELA/ 6689 through adverse possession.
- Who should bear the costs of the suit.

As to whether the Applicants have acquired the suit land KAJIADO/ KITENGELA/ 6689 through adverse possession. *The Applicants made a claim for adverse possession against the Respondent in respect to the suit land. In their submissions they reiterated their claim and contended that the suit meets the criteria for granting orders of adverse possession. They relied on the cases of* ***Kenya Tea Development Authority V Jackson Githui Karanja & Another (2006) eKLR; Sisto Wambugu V Kamau Njuguna (1982 – 1988) 1KAR and Public Trustee V K. Wanduru (1982 – 88) I KAR*** *to buttress their arguments. The Respondent opposed the claim and submitted that the suit does not meet the criteria for grant of orders of adverse possession orders and relied on the case of* ***Titus Kigoro Munyi V Peter Mburu Kimani (2015) eKLR to support its arguments.***

In Kenya, the doctrine of adverse possession is governed by section **13 of the Limitation of Actions Act which stipulates** 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."***

Section 37 of the Limitation of Actions Act further 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****."*

Judge Angote in the case of **Haro Yonda Juaje V Sadaka Dzengo Mbauro & Another (2014) eKLR aptly outlined the ingredients of adverse possession and summarized them as thus:' a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.'**

Further in the case of ***Sisto Wambugu v Kamau Njuguna (1982-888)1KAR*** Chesoni Ag JA (as he then was) at page 226 approvingly quoted Lindley MR in *Littledale v Liverpool college [1900*] 1 CH 19, 21 as follows:

> **"The same point was made by Bramwell LJ in Leigh v Jack [1879]5 Ex D 264,272, where he said referring to the Statute of Limitation; "Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. "If this is the right way to approach the problem, the question becomes "has the claimant proved that the title holder has been dispossessed, or has discontinued his possession, of the land in question for the statutory period?" rather than "Has the claimant proved that he (through himself or others on whose possession he can rely) has been in possession for the requisite number of years?" it certainly makes it easier to understand the authorities if one adopts the first formulation." (emphasis added).**

On the question of dispossession his Lordship said:

"The next question, therefore, is what constitutes dispossession if the proprietor. Bramwell, LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner" acts must be done which are inconsistent with his enjoyment of the soil for the purpose of which intended to use it."

For a party to be successful in a claim for adverse possession, it has to prove that it has been in open, continuous, notorious and uninterrupted possession of suit land for a period of 12 years. The party has to prove that it did not have permission of the registered owner to enter the land but he was aware of their entry therein. In line with these established principles, I will proceed to analyse the evidence before me.

In the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR,** the Court of Appeal held that:**' The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd (1980) supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. Immediately thereafter, the appellants had the respondent evicted from the suit premises. Even as at the time they filed their claim before the High Court, they had already been evicted. It was evident therefore that the respondent was not in actual possession for over 12 years as alleged.'**

PW1 testified that the suit land was purchased from their father and they entered the same in 1998. He explained that they do not reside thereon but have utilized it for grazing and quarrying from 1998. PW1 produced pictures showing cattle grazing and debris of stones. PW1 on cross examination explained that they did not have an office on suit land and never took out a license to carry out the quarrying activities. He admitted that initially the Respondent had carried out quarrying but left the suit land. I note in the supporting affidavit at paragraph 2, PW1 had sworn that they reside on the suit land. But in his evidence in chief and cross examination he confirmed that they ran a quarrying business on the suit land and graze their animals thereon. In PW1's testimony, he did not indicate whether the Respondent was aware of their activities on the suit land. He further admitted that even the Respondent had initially attempted to undertake stone mining business but abandoned it. The Applicants never produced any licenses from the Ministry of Mining nor the County Government of Kajiado to confirm that they were indeed undertaking quarrying business on the suit land. There was no proof of registration of the quarrying business. The Applicants claimed they leased portions of the suit land to people seeking to mine on the land but did not produce any lease documents nor procured any of the said parties as witnesses. On the issue of the large herd of livestock, I note the Plaintiff produced photos showing a few cattle grazing. Further, he admitted that they moved with their cattle looking for pasture, and this in essence means that they were not permanent on the suit land. The Applicants were further not clear in their evidence the respective portions they used for quarrying and grazing as well as the particular time they commenced doing so. In the case of ***Wainaina vs. Muarai & others (1976) klr 227***, " ***The land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary or identification for this purpose that which can be ascertained is certain that which is definitive. It must at least be plotted that if not certain it can be made certain."***

DW1 admitted that there were squatters on suit land who were removed therefrom in 2011 and the Respondent had also used the title to the suit land to secure a loan with Victoria Commercial Bank. DW1 contended that the place was rocky and could not be used for pasture. Since PW1 admitted that they looked for pasture for their livestock and could move around and from the pictures of the cattle presented, it is not conclusive proof of the large number of livestock claimed to have been reared on the suit land. Further, the Applicants averments of grazing and carrying out quarrying is contradictory as no pasture would subsist where quarrying has occurred. Further, using land as a pasture means occupation is often interrupted if the persons move to look for pasture elsewhere especially during dry spell. The Applicants confirmed that no one had issued them with a notice to vacate the suit land nor the Defendant had never visited the suit land. Further, that they reside on the adjacent parcel of land 6688 which surrounds the suit land. In associating myself with the decisions cited above**,** I find that the Applicants entry into the suit land was without the knowledge of the Respondent. Further, they did not demonstrate clearly on when they took occupation to graze animals or undertake quarrying thereon. On the question whether the Applicants continuously occupied suit land, they claimed they reared livestock on suit land and undertook quarrying thereon. Insofar as the Applicants entered the suit land and have been using it, except for the photos of stones, they have not demonstrated how the same was uninterrupted since they did not produce proof that they were running a full fledged quarrying business which was continuous. They claimed to have leased a portion of the land to third parties but never furnished court with any documents. They further failed to furnish in court any documentation in respect of their quarrying business. I opine that for a party to succeed in a claim for adverse possession, they have to fulfil all the requirements and the absence of any one of the same, renders the claim unsuccessful. In associating myself with the decisions cited above, I find that the claim for adverse possession over the suit land must hence fail as applicants did not prove they indeed entered suit land in 1998 and have been thereon openly, continuously and uninterruptedly to date.

As to who should bear the costs of the suit. Costs generally follow the outcome of a suit and since the Respondent is the inconvenienced party, I will direct the Applicants to pay it the costs of the suit.

It is against the foregoing that I find that the Applicants have not proved their case on a balance of probability and will proceed to dismiss it with costs.

Dated and delivered in Kajiado this 9th day of March, 2020

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

M/S. Oloo holding brief for Njoroge for defendant

Court assistant- Mpoye