



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 47 OF 2005

KIPRONO ARAP CHEPKWONY.....APPLICANT

VERSUS

BORNES TAPRANDICH BARMALEL.....1ST DEFENDANT

LEAH CHEPKIRUI BARMALEL.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff commenced this suit by way of Originating Summons dated 7th April, 2005. The same was amended orally pursuant to leave of the court granted on 30th May, 2019 to reflect the current title number. The dispute herein concerns a parcel of land measuring 38 acres formerly comprised in L.R NO. NAROK/TRANSMARA/KAPUNEI/8 but now registered as L.R NO. NAROK/TRANSMARA/KAPUNEI/525 which the Applicant claims to have purchased from the 1st Respondent on diverse dates between 1988 and 1990.

2. The Applicant asserts that though the Respondents refused to cause the transfer and registration of the property in his name, he has been in its open, quiet and exclusive possession.

3. The Applicant seeks the following reliefs:

a) That Applicant be declared to have been entitled to a total of thirty eight (38) acres formerly comprised in NAROK/TRANSMARA/KAPUNEI/8 and, now comprised in L.R NO. NAROK/TRANSMARA/KAPUNEI/525 by virtue of having been in quiet, open and peaceful possession of the same for a period exceeding 16 years.

b) That the said Applicant KIPRONO ARAP YATOR be registered as proprietor of 38 acres comprised in the land parcel formerly known as L.R NO. NAROK/TRANSMARA/KAPUNEI now comprised in L.R NO. NAROK/TRANSMARA/KAPUNEI/525 in place of LEAH BARMALEL (2nd Respondent) who is the current registered owner of the same.

c) That the costs of the suit be provided by the Respondent.

4. In response to the Originating Summons, the Respondents filed Replying Affidavits dated 3rd June, 2005, 9th June, 2005 and, 5th May, 2005, respectively denying the Applicants claim.

5. The 1st Respondent passed away in the year 2010 but was never substituted within one year, in accordance with the provisions of **Order 24 Rule 4** of the Civil Procedure Rules. The Applicant's claim against her has therefore abated. However, it is the Applicant's contention that the plaintiff's claim still lies against the 1st Respondent in her capacity as the personal representative of the estate of Tomason Barmalel (deceased) - the first registered owner and in her personal capacity as the current registered owner thereof.

6. The suit was canvassed by way of viva voce evidence pursuant to directions issued on 7th February, 2006, whereby the suit herein was deemed to have been commenced by way of Plaint and the Replying Affidavits accordingly treated as Defenses, thereto.

APPLICANT'S CASE

7. The Applicant testified in accordance with his supporting affidavit sworn on 7th April, 2005, after which he called one witness. He testified that he purchased a total of 38 acres from the 1st Respondent vide agreements executed on diverse dates in the year 1988 and 1989.

8. He further testified that the 1st Respondent and the 2nd Respondent (her co-wife) gave him vacant possession of the suit land upon execution of the said agreements and undertook to cause its transfer and registration in his name upon conclusion of succession proceedings over their husband's estate. He produced a copy of the said agreement dated 16th August 1988 as Plaintiff's exhibit 1. He also produced a bundle of documents comprising acknowledgements of payments made to the Respondents towards acquisition of the said land as Plaintiff's Exhibit 2.

9. He testified that the 2nd Respondent is currently registered as proprietor of L.R NO. NAROK/TRANSMARA/KAPUNE/525 which resulted from the sub-division of L.R NO. NAROK/TRANSMARA/KAPUNE/8 which was registered in her name on 20.11.1997. He produced certified copies of the map showing the said parcel's respective boundaries as Plaintiff's Exhibits 3 & 4.

10. It was his further testimony that he has undertaken various developments on the suit property including but not limited to planting tea bushes on about 10 acres, thereof and planting eucalyptus as well as wattle trees. He has also planted trees and uses the remainder of the suit land as a grazing ground for his livestock.

11. The Applicant stated that he sells his tea to Kapkatet Tea Factory Limited and produced delivery records for the period between February 2008 and September, 2016) from the said factory in support of his assertion as plaintiff's exhibit 5.

12. He testified that he fenced off the suit property using poles and barbed wire after completing payment of its purchase price in the year 1990. He said that he has workers who stay on the suit land and tend to his tea bushes.

13. PW 2, Daniel Ole Morintat, more or less echoed the Applicant's evidence. Notably, he stated that sometimes in the year 1990, the Applicant was shown his parcel of land measuring 38 acres after which he took possession, fenced it and undertook various developments including but not limited to planting tea bushes and other trees.

RESPONDENTS' CASE

14. Despite having been duly served, the 2nd Respondent did not attend court during the trial. However as pointed earlier, in their Replying Affidavits, the Respondents contest the Applicant's case.

15. The 1st Respondent denies ever entering into any transaction with the Applicant herein for the sale of the suit land.

16. She also avers that after she relocated to Kitale upon the demise of her husband. Furthermore, she states that she is a stranger to the Applicant's allegations that he took possession of the suit land.

17. On her part, the 2nd Respondent avers that she is an administrator of the estate of Paul Tamason Barmalel (deceased) pursuant to a Grant of Letters of Administration Intestate issued in her favour and one Elijah Kipkorir. See Annexure marked, "LCB 1" to the 2nd Respondent's Replying Affidavit sworn on 5th May, 2005.

18. She also denies ever entering into any transaction with the Applicant over the suit land and avers that the 1st Respondent has been dealing with the suit land adversely without any legal basis as she is not an administrator of the estate of Tomason Barmalel (deceased).

19. The 2nd Respondent further avers that the Applicant is a trespasser on the suit land and hence he ought to be evicted.

ISSUES FOR DETERMINATION

20. Having considered the pleadings, evidence on record, and applicant's submissions, the following issues fall for determination:

- i. Whether the claim against the 1st Respondent who has since died, lies against 2nd Respondent in her capacity as the personal representative of the estate of Tomason Barmalel (Deceased)- the first registered owner of the suit property
- ii. Whether the Applicant has been in occupation of a total of thirty eight (38) acres formerly comprised in that property known as L.R NO. NAROK/TRANSMARA/KAPUNEI/8 now comprised in L.R NO. NAROK/TRANSMARA/KAPUNEI/525;
- iii. Whether the Applicant's occupation, if any; has been quiet, peaceful, uninterrupted, hostile and/or exclusive; and
- iv. What remedies are available to the parties herein?

ANALYSIS AND DETERMINATION

21. In order to answer the first issue it is important to trace the history of the applicant's claim. The 1st and 2nd Respondents are both widows and administrators of the estate of Tomason Barmalel deceased who was the registered owner of L.R NO. NAROK/TRANSMARA/KAPUNEI/8 now comprised in L.R NO. NAROK/TRANSMARA/KAPUNEI/525. After Tomason Barmalel's death, the 1st Respondent in her capacity as the personal representative of Tomason Barmalel's estate, sold portions of the deceased's land measuring 38 acres to the Applicant. This was done vide various sale agreements entered into on diverse dates between 1988 and 1989.

22. The applicant paid the full purchase price and took possession thereof in 1990 though the title has never been transferred to his name.

The 1st respondent undertook to sub-divide the land and transfer the applicant's portion measuring 38 acres to him but she never did so. Instead, the whole parcel of land was registered in the name of the 2nd defendant who is the only surviving widow of Tomason Barmalel.

23. Since the 2nd respondent is holding the suit property in trust for the beneficiaries of the estate of Tomason Barmalel and the late Bornes Taprandich Barmalel, and since the applicant is a creditor of the estate of Bornes, Taprandich Barmalel, it follows that the said claim can be enforced against the 2nd respondent.

24. Learned counsel for the applicant cited the case of **Peter Thuo Kairu v. Kuria Gacheru (1988) 2 KAR** where the Court of Appeal held that the law relating to prescription affects not only present holders of title but their predecessors in title. He also cited the decision of the court in **Mwangi & Another –v– Mwangi. (1986) KLR 328**, where it was also held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. I concur with the said decisions.

25. Regarding the second issue, it is the applicant's uncontroverted evidence that he has been in open, continuous and uninterrupted occupation of the suit property measuring 38 acres since 1990 and he has developed the same by planting eucalyptus trees, wattle trees and tea bushes. He said he has been utilizing the remainder of the land for grazing his livestock.

In the case of Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR the Court of Appeal set out what one needs to prove in a case of adverse possession;

...In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition...(emphasis ours).

26. Furthermore, the counsel for the Applicant cited the case of **Githu Vs Ndeete (1984) KLR 776** where the Court of Appeal held that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession.

27. The Court of Appeal in **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR** determined that a claim for adverse possession could be sustained by a purchaser in possession of the subject property. See also the decision of the Court in **Public Trustee vs. Wanduru, where Madan JA** stated as follows; -

"... adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

28. In the instant case, it is clear that the Applicant has had exclusive possession of the suit property for a period of at least 15 years, prior to the filing of this suit that is, from the year 1990 when he completed payment of the purchase price. This fact was never refuted by the Respondents. As a matter of fact, the 1st Respondent did indicate in her Replying Affidavit that she relocated to Kitale after the demise of her husband and was thus a stranger to the Applicant's assertion that he took possession of the suit land.

29. From the evidence on record, I am satisfied that the applicant has established her case on a balance of probabilities. I find and hold that title L.R NO. NAROK/TRANSMARA/KAPUNE/525 currently registered in the name of Leah Chepkurui Barmalel measuring 38 acres, formerly comprised in L.R NO. NAROK/TRANSMARA/KAPUNE/8 in the name of Tomason Parmalel has been extinguished by dint of his adverse possession.

30. Accordingly, I enter judgment for the plaintiff and make the following final orders:

a) A declaration is hereby issued that KIPRONO ARAP YATOR the Plaintiff (Applicant) is entitled to a total of 38 acres comprised in L.R NO. NAROK/TRANSMARA/KAPUNE/525; by virtue of his adverse possession.

b) I hereby direct that the said KIPRONO ARAP YATOR be registered as proprietor of L.R NO. NAROK/TRANSMARA/KAPUNE/525 measuring 38 acres in place of LEAH CHEPKURUI BARMALEL who is the current registered owner thereof.

c) The Plaintiff is awarded the costs of this suit

Dated, signed and delivered at Kericho this 8th day of November, 2019.

J.M. ONYANGO

JUDGE