



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

ELC NO. 5 OF 2019

HAWA ABDILAH.....PLAINTIFF/APPLICANT

VERSUS

ISAAC NDEGE ARAP CHUMO

(Sued separate as administrators of the estate of

MALAKWEN A CHENGO.....DEFENDANT/RESPONDENT

JUDGMENT

By an Originating Summons the applicant filed this suit seeking for the following orders that :

- a) The applicant has obtained title over land parcel No. Nandi/Mosombor/444 by way of adverse possession for having occupied the said parcel of land nec vic, nec claim, nec precario for a period of over twelve years since January, 2001.
- b) Consequent, upon the forgoing, the applicant be registered as the sole absolute and indefeasible proprietor of the aforesaid parcel of land being Nandi/Mosombor/444.
- c) The county land registrar, Nandi County do enter the name of Hawa Abdilahi as the proprietor of the said land parcel No. Nandi/Mosombor/444.
- d) The application was based on the grounds that the Applicant has been in open, continuous and uninterrupted occupation of all that parcel of land known as Nandi/Mosombor/444 measuring 0.83 Ha since January, 2001 without the consent of the Respondents.

Directions were taken whereby parties agreed to file written submissions to dispose off the suit which were duly filed.

Applicant's Submission

It was the applicant's case that the Respondent's title of Malakwen A. Chengo (deceased) has been extinguished by operation of the law having been kept out of possession since 1987 cumulatively more than 31 years and that the applicant is entitled to be registered as the proprietor of 0.83 Ha comprised in land parcel No Nandi/Mosombor/444 in place of the Respondent.

Applicant submitted that Kiptum Arap Chengo obtained grant of letters of administration of the estate of the late Malakwen A. Chengo vide Kapsabet PMCC P&A No. 36 OF 1987 but is now deceased and that the 2nd defendant obtained grant of letters of administration intestate to the same estate vide Kapsabet PMCC P&A No 112 of 2017.

In the applicant's further affidavit, she stated that she obtained a gift from her late husband which became halal immediately and that there is nothing illegal in their occupation except for their prescription rights which was acquired pursuant to Section 7 of the Limitation of Action Act, Cap 22 Laws of Kenya.

The applicant also stated that she has been in possession of the suit land since January 2001 from one Dorcas Lagat a period of over 18 years and that prior to the purchase of the suit land, Dorcas Lagat had occupied the land for a period of 14 years.

It is the plaintiff's case that she has been in open, continuous and uninterrupted occupation of all that parcel of land Nandi/Mosombor/444 mearing 0.83 hectares since January 2001 without the consent of the Respondents and therefore the defendant's title of Malakwen A. Chengo(deceased) has been extinguished by operation of the law the land having been kept out of possession since 1987. The defendant's contention that the deceased died in the year 1986 and therefore could not transact in the year 1987 is a mere denial.

Respondent's Submission

The respondent opposed the application through a replying affidavit sworn by ISAAC NDEGE ARAP CHUMO on the grounds that land parcel No Nandi/Mosombor/444 was registered in the names of Malakwen A. Chengo who as at her demise had not sold the same.

It was further the respondent's submission that the originating summons herein is unnecessary as the issues in dispute are purely succession matters which can be addressed by the Magistrate's court in Succession Cause No. 112/2017. Further that Dorcas Lagat had no legal capacity to sell land to Mohammed Abdallah and therefore Hawa Abdalla cannot enforce an illegal agreement by way of originating summons.

The respondent stated that if there is at all any claim, the applicant has no legal capacity to initiate the proceedings as she holds no letters of administration over the estate of her late husband and therefore has no locus standi to file a suit against the estate of MALAKWEN CHENGO.

It was the respondent's submission that there is no evidence that the plaintiff/applicant is in occupation of land parcel No. NANDI/MOSOMBOR/444 and that occupation of the estate land by Dorcas Lagat for 14 years. The respondent further submitted that the green card of the entire Nandi/Mosombor/444 shows that the land measures approximately 0.83 hectares which is more than 2 acres. That the plaintiff seeks to be awarded the whole parcel of land yet there are other purchasers on the ground. He therefore urged the court to dismiss the plaintiff's claim with costs.

Analysis and Determination

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 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.

For an applicant to succeed in a case of adverse possession he or she must satisfy the ingredients of adverse possession. This is a legal doctrine that dispossesses a legal owner of his or her land by operation of the law therefore the stringent measures of proof must be adhered to.

The possession 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 a fresh 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, 4th Edition Volume 28, at 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 **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamataka Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus:-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

The possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner.

In the case of **Githu –vs- Ndeete [1984] KLR 776** the Court of Appeal held that: -

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner take legal proceedings or makes an effective entry into the land; Giving of notice to quit cannot be an effective assertion of right for purposes of stopping running of time under the Limitation of Actions Act.”

As regards what would constitute dispossession, it is stated in Volume 24 Halsbury’s Laws of England, 3rd Edition at page 252 thus:-

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

In order for the plaintiff to succeed in her claim in this suit, she has to prove that she has used the lands as of right: *nec vi, nec clam, nec precario* (with no force, no secrecy, no evasion) and her possession has been continuous and has not been broken or interrupted.

In the case of **Wambugu –vs- Njuguna [1998] KLR 173** the Court of Appeal held thus:-

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

Also see the case of **Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR** where it was observed:

“It must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors.

It is clear from the foregoing provisions of the law and case law that a claim for adverse possession can be sustained against the estate of a deceased person. **“In the case of Francis Gitonga Macharia – v- Muiruri Waithaka, Civil Appeal No. 110 of 1997 this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property....”**

On whether the applicant has made up a case for being granted the orders sought, by the time the current suit was filed, the title held by the respondents had already been extinguished by the applicant’s alleged adverse possession of the suit property.

I find that the plaintiff has established that she has acquired the suit land by adverse possession and therefore entitled to the orders sought. I direct that the Nandi County Land Registrar do enter the name of Hawa Abdilahi as the proprietor of land parcel No. Nandi/ Mosombor/444. The respondent to pay costs of the suit.

DATED and DELIVERED at ELDORET this 11TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Magari for Plaintiff and Mr.Miyienda holding brief for Mr.S.K. Kitur for Defendant

