



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L CASE NO.304 OF 2017 (OS)

LABAN KIMELI CHEMOIYAI.....1ST PLAINTIFF

WILLIAM KIPTUM CHEPSEON.....2ND PLAINTIFF

SAMUEL KIPROTICH KIMUTAI.....3RD PLAINTIFF

- VERSUS -

WANJIKU WA KAMAU.....1ST DEFENDANT

GRACE KAMAU KURIA.....2ND DEFENDANT

JUDGMENT

By way of an Originating Summons dated 7th September 2017, the applicants Laban Kimeli Chemoiyai, William Kiptum Chepseron and Samuel Kiprotich Kimutai moved to court claiming to have acquired titles of portions of land measuring 7 acres or 2.83 Hectares, 5 acres or 2.02 Hectares and 4 acres or 1.61 Hectares respectively of property known as GRMT 1R 42199 SITUATE IN SOUTH EAST OF ELDORET MUNICIPALITY LAND REFERENCE NO. 11127/100, SURVEY PLAN NO. 133025 by adverse possession. The applicants listed the following questions for determination by the court:

- a. Whether the 1st, 2nd and 3rd applicants herein have acquired title of portions measuring approximately 7,5 and 4 acres respectively to the said land by adverse possession.
- b. Whether the respondent their heirs, agents, assigns and or successors hold the title of a portion measuring 7,5 and 4 acres respectively to the said land in trust for the applicant.
- c. Whether the applicants herein have acquired title of a portion measuring approximately 7,5 and 4 acres to the said land by adverse possession.
- d. Whether the title held by the respondents in respect of the said parcel of land got extinguished on the expiry of 12 years after the applicants took possession thereof.
- e. That the County Land Surveyor do subdivide the suit property and the same be registered in the names of the applicants.

The respondents were served with the summons but did not file any response within the stipulated period. The applicants therefore proceeded by way of formal proof.

APPLICANTS' CASE

PW1 Laban Kimeli Chemoiyai, PW2 William Kiptum Chesergon and PW3 Samuel Kiprotich Kimutai adopted their statements and stated that they purchased portions measuring 7acres, 5acres and 4acres respectively in 1992 from Land Reference No. 11127/100 on Survey Plan No. 133025 grant No 47199 from the registered owners Wanjiku Wa Kamau and Grace Kamau.

The applicants further stated that they took possession immediately after purchase in 1992 and have been in such occupation continuously without interruption since then which is more than 12 years. They further stated that they have carried out developments on the suit land.

The applicants produced a copy of the title deed to the suit land but indicated to the court that they had misplaced the copies of the agreements and the transfer forms. They urged the court to declare that they had acquired the suit land by way of adverse possession and that the land should be subdivided and titles given to them plus costs.

APPLICANTS' SUBMISSION.

Counsel for the applicants filed submissions and reiterated their evidence as stated above. Counsel relied on the provisions of sections 7, 13, and 38 of the Limitation of Actions Act which governs the doctrine of adverse possession.

Mr. Korir counsel for the applicants submitted that the applicants have been in occupation for more than 12 years since 1992 continuously without interruption hence they have met the threshold for grant of an order of adverse possession

Counsel cited the case of **Nelly Jeruto Kiplagat v. Manubhai Dahyabhai Tailor(2020) eKLR** where this court declared the applicant an adverse possessor after meeting the ingredients of adverse possession. He therefore urged the court to find that the applicants have proved their case as prayed.

ANALYSIS AND DETERMINATION.

The issues for determination are as to whether the respondents have been holding the suit land in trust for the applicants, whether the applicants have acquired the suit land by way of adverse possession and finally whether the County Land Registrar can be ordered to subdivide the suit land to be registered in the applicants' name for their respective portions.

On the first issue as to whether the respondents hold the suit land in trust for the applicants, I will be guided by the case of **Llyods Bank Plc – vs- Rosset, (1991) 1 AC 107,132**, where the court held that

“a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act *prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case*’

From the onset it is important to note that the applicants did not produce any agreements for sale which they alleged to have misplaced. There was only a copy of the title which was produced. The agreements could have been useful to the court to ascertain whether there was any intention to create a constructive trust. The court was denied this opportunity.

Land transactions are very delicate and when a party loses or misplaces certain key documents in a land transaction, the best that such a party can do is to report the loss to the Police station and be issued with a Police abstract. The applicants would have suffered no injury or prejudice by reporting the loss of the crucial documents to the police. Without these crucial documents the court cannot assume their existence and presume that the agreement had an intention of creating a constructive trust for the respondent to hold the land in trust for the applicants. I find that this has not been proved and it therefore fails.

On the second issue as to whether applicants can succeed in their claim for adverse possession, it is trite law that in order to succeed in a suit for adverse possession, one needs to demonstrate that he has been on land *nec vi, nec clam, nec precario*, that is, without violence, without secrecy and without permission of the registered owner, for a continuous, uninterrupted period of 12 years. The person also needs to demonstrate the necessary *animus possidendi*, or intention to acquire the land.

The doctrine of adverse possession is anchored on Section 7 of the Limitation of Actions Act, which provides as follows:

“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 applicants claim that they purchased the said parcels of land in 1992 whereby the respondents executed transfer documents and the original title which have since gotten lost. The applicants however have a copy of the freehold title which indicates the registered owners as Wanjiku Wa Kamau and Grace Kamau Kuria as the grantees of 6.475 hectares. This document was issued on 15th May 1989.

As stated above the applicants only produced a copy of the title deed in the name of the respondents. It would have been prudent for the applicants to produce a copy of an official search to establish the current registered owners now that they claimed that they misplaced all the agreements and the transfer documents. The applicants also did not indicate to the court at what consideration they bought the suit parcels of land even if they claim that they misplaced their agreements.

Adverse possession is a doctrine that legally dispossesses a proprietor of his or her suit land by the operation of the law and that is why proof of the ingredients of the doctrine are very stringent. This is due to the fact that it is a doctrine that can easily be misused or misapplied to dislodge a registered owner of his or her property.

The applicants stated that they have been in occupation for a period of more than 2 years and have developed the suit land. Nothing would have stopped the applicants from attaching photographs to show the said developments. This was not done therefore making it difficult to establish occupation taking into consideration that the applicants did not produce any proof of how they came into occupation of the suit land.

In the case of **Kasuve v. Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a plaintiff in a claim for adverse possession has to prove in the following terms;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

Having considered the pleadings, the evidence and the submissions by counsel together with the relevant authorities, I find that the applicants have not met the threshold of grant of the orders sought for adverse possession. I will therefore not consider the issue as to whether the Land Registrar should be ordered to subdivide the suit parcel of land and transfer to the applicants. The originating Summons is therefore dismissed with no orders as to costs.

DATED and **DELIVERED** at **ELDORET** this **30th DAY OF JUNE, 2020**

M. A. ODENY

JUDGE