



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L NO. 190 OF 2014 (OS)

MUSA CHERUIYOT CHEPKURUL.....PLAINTIFF

VERSUS

JULIA KAPTUYA CHIRCHIR.....DEFENDANT

JUDGMENT

By way of originating summons dated 5th June 2013 the plaintiff/applicant herein sued the defendant/respondent seeking for the following orders:

- a) That the applicant has acquired title to land reference Baringo/Kewamoi "A"/1157 and its resultant parcels Baringo/Kewamoi "A"/3381,3382,3383 and 3384 through adverse possession
- b) That the costs of the originating summons be borne by the respondent.

The summons was premised on the grounds that the applicant has been in possession of the land since September 1987 and that the land was transferred to the respondent but she did not take possession of it. The respondent filed a response and stated that she bought parcel number *Baringo/Kewamoi "A"/1157* from the applicant and paid the full purchase price. That the applicant signed the application forms for consent of the Land Control Board and the transfer forms and the respondent was issued with title to the said land.

APPLICANT'S CASE

Pw1 Musa Cheruyiot Chepkurui testified that he bought the land from Jackson Kimaiyo Chemoywo together with Haron which land was originally plot number 932 but upon sub-division it became plot number 1157 which belonged to him and 1158 to Haron. He stated that he was registered as the owner on 18th September 1987 and the title to plot number 1157 was surrendered to the Land's office on 8th March 2012 and the mutation in respect of plot Nos.3381,3382,3383 and 3384 was registered on 16th October 2012.

PW1 produced copies the titles as pex no. 1a,b,c and d and the copies of search certificates together with mutation form produced as pex no. 2a,b, c, d and 3 respectively.

It was PW1's further testimony that he is in occupation of the suit land and he has fenced off the same with barbed wire, built a house, has been cultivating and that he is rearing livestock.

PW1 also stated that he has never sold the land to the respondent and admitted that he was charged with malicious damage to property of the suit land while this matter was pending in court and put on probation for 2 years by the Kabarnet court in Criminal case no. 57 of 2015.

On cross-examination by counsel for the defendant, he stated that he was not challenging the manner in which the land was acquired as per his statement and that he has been in quiet possession of the land. PW1 also denied having signed the application for consent to the Land Control Board and the transfer form.

PW1 denied demolishing the defendant's house and stated that the house in the photograph was his and that he had made an application to court to restrain the defendant from using the land but the same was declined since the defendant had title to the said parcel.

PW2 Haron Saigut Toroitich stated that he had bought land together with the plaintiff and that plot no. 1157 was the plaintiff's whereby the plaintiff had a house. That the plaintiff lived on the suit plot though he had another plot at Kapropita.

On cross-examination he stated that the plot was originally No. 932 and the same was sub-divided with resultant plot Nos. 1157 and 1158 he however he did not have any document to confirm the same. He was also not aware whether the plaintiff had sold off the land and whether he had appeared before the Land Board. When shown the photographs to the suit land he said that he had been there the previous month and that they were neighbors. That was the close of the plaintiff's case.

RESPONDENT'S CASE

DW1 Julia Kaptuya Chirchir testified that she is a teacher and that in January 1987 she was looking for land to purchase when the late Simeon Chebor took her to the plaintiff who had school fees issues. She gave the plaintiff ksh 30,000/= in April the same year. She stated that in July 1987 they went to the land board where she was granted a consent. The plaintiff signed the application form, and produced his national identity card. She then got a transfer and title to the land.

It was DW1's evidence that she had built a house in 2014 and 2015 on the plot but the plaintiff demolished it necessitating a report to the police. That the plaintiff was charged with malicious damage to property and put on probation for 2 years. She further stated that the plaintiff has never lived on the suit land. She produced documents dated 11th August 2014 which included a copy of title, search certificate, green card, transfer of land form, application for consent and a letter of consent to show that she is the registered owner of the suit land. DW1 also stated that she built a house where her worker resides.

On cross-examination by counsel for the plaintiff she stated that there was a small house on the suit land. She had a servant who was residing on the land and that she did not have evidence of the OB reports to the police.

On re-examination she stated that the plaintiff neither resides on the suit land nor cultivating the land as he had alleged. That was the close of the defence case.

PLAINTIFFS SUBMISSIONS

Counsel for the plaintiff reiterated the evidence of the parties and submitted that the plaintiff has acquired the land through adverse possession and relied on the provisions of section 7 of the Limitation of Action Act which states as:

“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.”

Counsel further cited the provisions of section 37 of the said Act which states 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 of this Act, 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 proprietor of the land.”

Mr. Mathai submitted that by the time of filing this suit the plaintiff had lived on the suit land for more than 27 years and that defendant could not dispossess him of the land since the defendant had confirmed that she did not live on the suit land. Counsel referred the court to Vol. 24 Halsbury's Laws of England, 3rd Edition at page 252 which states as follows on dispossession:

“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 sufficient to prove possession.”

Counsel further submitted that the sub-division by the defendant did not stop the plaintiff from claiming adverse possession. Counsel relied on the case of Paul **Kiptenai K. Birach v. Nandiko Lukhombea & anor(2015) eKLR** where the court found the plaintiff had proved his case and the 2nd defendant's title had been extinguished by operation of the law.

RESPONDENT'S SUBMISSIONS

Mr. Chemwok counsel for the respondent submitted that the respondent gave evidence on her possession upon purchase of the suit land, payment of the purchase price, filing of application for the Land Control Board consent, transfer of the suit land and issuance of titles to the suit land with the assistance of the applicant which has not been disputed by the applicant.

Counsel further submitted that the applicant was charged with malicious damage to property of the respondent at Kabarnet Court whereby the applicant admitted that he was put on probation for two years. Further that the respondent had proved that she is the registered owner of the suit land through the production of a copy of title deeds and a green card showing the entries of transfer.

Mr. Chemwok also submitted that the photographic evidence showed that there was a house at the corner which had been constructed by the respondent and that her worker is in possession thereof.

Counsel relied on the case of **Wambugu v. Njuguna(1983) KLR 173** where the court held that adverse possession contemplates two concepts namely possession and discontinuance of possession. The question is whether the title holder had been dispossessed for the statutory period of 12 years. Counsel further submitted that the applicant has not shown the court at what stage he surrendered possession to the respondent and at what stage he took back the possession.

In addition it was counsel's submission that the applicant had failed to show how he took over the land, whether it was openly, notoriously and exclusively, he had proved that the respondent was alert in protecting her land against him as was held in *Mbira v. Gachuhi*(2002) EALR 137 where the court set the requirements for adverse possession and held as hereunder:

"...a person who seeks to acquire title to the land by the method of adverse possession for the applicable statutory period must proof non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory period without interruption."

Counsel therefore urged the court to find that the applicant has failed to prove that he has acquired the suit land vide adverse possession and dismiss the same with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as to whether the applicant has proved the ingredients in a claim of adverse possession. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in a claim of adverse possession were stipulated in the case of **Wambugu –v- Njuguna (1983) KLR 173.** where the Court of Appeal held that there has to be proof of possession and discontinuance of possession.

In **Munyaka Kuna Company Limited- Vs- Bernado Vicezo De Masi** (The Administrator of The Estate of Domenico De Masi (Deceased) (2018) eKLR, the court while addressing the four ingredients stated as follows:

" To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (nec vi nec clam nec precario) for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted."

The applicant is seeking for an order that he has acquired by way of adverse possession parcel number Baringo/Kewamoi "A"/1157. The respondent is the registered title holder having bought the same from the plaintiff in 1987 and took possession thereof.

The applicant claims that the respondent did not take possession but there is evidence to the contrary to prove that the respondent took possession upon purchase, subdivision and transfer of the suit land. It is on record that the applicant admitted that he demolished the respondent's structures and was charged with malicious damage to property at Kabarnet court vide Criminal Case No 57 of 2015 whereby he was put on probation for 2 years. Why was the applicant charged with malicious damage to property namely 2 semi-permanent house made of iron sheets and timber valued at Kshs 80,000/ if the same were his structures? This is an indicator that the respondent was in possession and that is why the applicant was charged with the destruction of her structures. The applicant could not have maliciously damaged his own property.

The applicant claimed to be in possession of the suit land, but the evidence on record shows otherwise. His own witness PW2 confirmed to the court that the applicant has another home in Kapropita where he stays.

The applicant is a person who had sold the suit land to the respondent, made an application for consent to the land Control Board, participated in the process of transfer of the title to the respondent and now wants to change his mind that he did not sell the land to the respondent. If the respondent acquired the land illegally, why did the applicant not report the forgery or the illegality to the relevant investigative agencies to probe the issues. The applicant cannot have his cake and eat it. The evidence put forth by the applicant does not meet the threshold for acquisition of the suit land by way of adverse possession.

I find that the applicant has not proved his claim against the respondent and is therefore dismissed with costs.

DATED and DELIVERED at ELDORET this 30TH DAY OF JULY, 2020

M. A. ODENY

JUDGE