



REPUBLIC OF KENYA
IN THE HIGH COURT F KENYA AT KAKAMEGA
ENVIRONMENT AND LAND CASE NO. 11 OF 2012
IN THE MATTER OF LIMITATION OF ACTIONS ACT
(CAP. 22) LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. KISA/ESHIBINGA/1257

BETWEEN

ELSEBA WERE AMBUNDOPLAINTIFF/APPLICANT

VERSUS

SILAS OMUKULA ANDENYI DEFENDANT/RESPONDENT

JUDGMENT

1. **ELSEBA WERE AMBUNDO** (The Plaintiff), took out an Originating Summons dated 21/11/2012 against **SILAS OMUKULA ANDENYI** (The Defendant) in which she sought the following orders;

- a. ***“A declaration that the applicant is entitled to land measuring 3 acres or thereabouts comprised in LR. NO. KISA/ESHIBINGA/1257 by virtue of adverse possession.***
- b. ***A declaration that upon expiry of 12 years the Respondent held 3 acres or thereabouts of land comprised in title No. KISA/ESHIBINGA/1257.***
- c. ***A declaration that upon expiry of 12 years, the Respondent’s interest in land measuring 3 acres or thereabout comprised in LR. No. KISA/ESHIBINGA/1257 got extinct.***
- d. ***A declaration that the Respondent do transfer land measuring approximately 3 acres or thereabout comprised in LR No. KISA/ESHIBINGA/1257 and or in default the Executive Officer of this court do execute all necessary documents to effect transfer.***
- e. ***An order that the applicant herein be registered as proprietor of land measuring approximately 3 acres or thereabouts comprised in LR No. KISA/ESHIBINGA/1257.***

2. The Originating Summons was supported by an affidavit by the plaintiff sworn on the same day. In that affidavit, the plaintiff deponed that the Defendant is her brother-in-law; that the Defendant registered himself as sole proprietor of the suit land after the death of her husband without due regard to other beneficiaries and that the Defendant’s actions were made in bad faith to deny other family members their share in LR. No. KISA/ESHIBINGA/1257. The plaintiff further deponed that she was entitled to 3 acres and that the Defendant’s actions had deprived her of her rights.

3. Upon being served, the Defendant filed a replying affidavit opposing the Plaintiff's claim. The Defendant admitted that he was the registered owner of the suit land but denied that the applicant was entitled to any part of his land by adverse possession or trust. Of significance, the Defendant denied that the Plaintiff has ever occupied any part of his land.
4. On 13/5/2014 directions were given to the effect that the matter was to proceed by way of Viva Voce evidence and parties were to take dates at the Registry.
5. This matter came before me on 23/10/2014 but as there was no evidence of service on the Defendant, it could not proceed. Finally it was listed before me on 11/2/2015 and on that day, the Plaintiff was present while the Defendant was represented by Mr. Nyikuli. As both parties were ready to proceed, the Plaintiff who had all along acted in person, took the witness stand.
6. The Plaintiff testified that she is a peasant farmer from Kisa Shivinga in Kakamega County. She told the court that she sued the Defendant who is her brother-in-law because he took away her land. The witness said that the land had been sub-divided amongst family members, the plaintiff's late husband and the Defendant. The Plaintiff further testified that she resides on the piece of land that was left behind by her husband but which number she could not remember. She told the court that she resides on a different parcel of land from the one she is claiming, and that the Defendant took away the land she used to cultivate during her husband's lifetime, immediately her husband passed away. The Plaintiff said that her husband died 14 years ago and that she has no dwelling house on the suit land. She claimed 3 acres but said that she did not reside on those three (3) acres. She told the court that she had not been on the land continuously for twelve years before filing this suit. She asked the court to help her get the land.
7. At the close of the Plaintiff's testimony, Mr. Nyikuli, learned counsel for the Defendant, offered not to cross-examine the Plaintiff and also informed the court that they were not calling evidence. He asked that the court decides the suit on the basis of the evidence on record.
8. The Originating Summons before court shows that it is brought under O.27 rule 1 of the Civil Procedure Rules. This might be a typographical error given the fact that the application clearly shows that the Plaintiff claims to have acquired 3 acres of parcel No. Kisa/Eshibinga/1257 by adverse possession. This is also clear from the questions framed for determination which include;
 1. Whether the applicant should be registered as proprietor of land measuring approximately 3 acres or thereabouts comprised in the title No. KISA/ESHIBINGA/1257 by virtue of adverse possession and trust; or
 2. Whether the Respondent as the registered proprietor of LR. No. KISA/ESHIBINGA/1257 should transfer land measuring 3 acres or thereabouts comprised in title No. KISA/ESHIBINGA/1257.
9. The Plaintiff has testified that she is a widow to the Defendant's brother, and that the Defendant took away the land which belonged to the family and stopped her from cultivating the land immediately her husband passed away. She also told the court that she has not lived on the land continuously for twelve years before filing this suit.
10. Looking at the affidavit in support of the Originating Summons, the Plaintiff seems to claim a share of the suit land arguing that it is family land. Nowhere in the affidavit has the Plaintiff said that she is living on the land or that she has acquired title to land by prescription. The affidavit and testimony in court by the Plaintiff do not support the questions for determination and prayers in the Originating Summons that the Plaintiff has acquired title to three (3) acres in the land known as KISA/ESHIBINGA/1257 by adverse possession. The evidence adduced by the plaintiff is that she neither cultivates the land nor has a house on the land which means she is not in possession of the suit land.
11. Before the hearing of the suit commenced, the court sought to know from the Plaintiff whether she could seek legal advice. The Plaintiff was not willing. After the conclusion of the Plaintiff's testimony, the court once again reminded the Plaintiff that it may be desirable to seek legal advice but she once again declined. This explains why the Defendant may have chosen not to tender evidence. The plaintiff was

simply not helping her case.

12. The Plaintiff sought a declaration that she had acquired title to 3 acres on parcel No. Kisa/Eshibinga/1257. Such a claim could only arise by virtue of Section 7 of the Limitation of Actions Act if the registered owner's right to reclaim that portion of land was time barred. The Section provides as follows;

S.7 “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.”

13. The Plaintiff's evidence is that she was cultivating the portion she claims while her husband was alive but stopped after his demise. She also told the court that she no longer cultivates the land and that she does not have a house on the suit land. The Plaintiff further told the court that her husband died 14 years ago which means she stopped using the land 14 years ago. Her claim for adverse possession, if it existed, was interrupted 14 years ago and the Plaintiff does not seem to have occupied the land continuously for twelve years preceding her filing of this suit.

14. It is only after one has occupied another's parcel of land for more than twelve years that one can invoke Section 38 (1) of the Limitation of Actions Act which provides as follows;

S.38 (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.”

15. The owner of the land must have lost possession to that land or must have discontinued his possession thereto. In the case of Wambugu –vs- Njuguna [1983] KLR 172 the Court of Appeal stated as follows at holding 3.

“The Limitation of Actions Act, on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. 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.”

16. in this case, there is neither dispossession nor discontinuance of possession of the registered owner of the land. The plaintiff cannot therefore claim to have acquired title to the 3 acres she claims by adverse possession.

17. A person claiming to have acquired prescriptive rights, like the Plaintiff in this case, takes out an Originating Summons under Order 37 rule 7 of the Civil Procedure Rules (2010) to move the court for a declaration to that effect. Under O. 37 rule 7 an applicant must file a supporting affidavit to the Originating Summons attaching a certified copy of the extract of title.

18. The plaintiff although filed an affidavit did not attach or annex a certified copy of the extract of title as required. She also did not produce one in her evidence. The plaintiff did not therefore show that her claim was directed at the right person and true owner of the land. The plaintiff did not therefore prove her claim based on adverse possession.

19. The Plaintiff appears to have also raised a claim of trust when she framed one of the questions for determination as follows;

“Whether the applicant should be registered as proprietor of land measuring approximately 3 acres or thereabouts comprised in the title No. KISA/ESHIBINGA 1257 by virtue of adverse possession and trust.”

20. Apparently in support of the claim for trust, the plaintiff deponed at paragraph 3 of her affidavit in support of the Originating Summons that “the Respondent herein registered himself as sole proprietor of whole of L.R. **KISA/ESHIBINGA/1257** after the death of his brother without due regard to other beneficiaries.” The Plaintiff was saying that the suit land is a family land and that her late husband as brother to the Defendant may have been entitled to a portion of that land. This would appear to be a claim for customary trust.

21. The Plaintiff also attached on her affidavit a Judgment and Decree of this court (**Chitembwe, J.**) dated 22/5/2012 being a decision on appeal against an award that had been made by the Western Provincial Appeals Committee where the Defendant herein had appealed against the decision of that Tribunal which had found in favour of the Plaintiff herein and awarded her 3 acres of the suit land.

22. In allowing the appeal, the court made the following orders as can be seen from the Decree;

1. ***“The decision by the two Tribunals is set aside and replaced.***
2. ***That each of the parties herein utilize three (3) acres out of plot No. KISA/ESHIBINGA/1257.***
3. ***Each party is at liberty to file a proper suit before the High Court for purposes of obtaining a title for his/her respective portion.”***

23. It appears that it was after that Judgment and Decree that the Plaintiff moved this court to try and get a title for the three (3) acres she claims.

24. This court is not sitting on appeal over Justice Chitembwe’s Judgment. The judge simply advised parties to file a suit in appropriate manner and have their respective claims determined. As it is in this case, the Plaintiff only says that she is entitled to three acres by virtue of adverse possession and trust. Since I have already determined the issue of adverse Possession, the only issue I have to determine is whether the Plaintiff has proved her claim based on trust or customary trust, whatever the case may be.

25. The Plaintiff did not adduce any evidence to demonstrate how her claim based on trust arises. The only evidence she gave was that the land had been sub-divided between her late husband and the Defendant and that after her husband’s demise, the Defendant registered himself as the owner of the whole parcel of land. The Plaintiff did not tell the court the origin of this parcel of land and to whom it belonged previously. She did not even say when the land was registered in the Defendant’s name. There was no evidence either oral or documentary to support her assertions. The Plaintiff has not even shown how the Defendant got the suit land. The plaintiff is simply asserting without evidence that this was family land and that the Defendant holds it in trust for himself and the Plaintiff. Trust whether customary or not is a question of fact which must be proved.

26. In the case of ***Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR*** which quoted with approval the holding in the case of ***Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42***, the Court of Appeal held that customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.

27. The Plaintiff in this case has not demonstrated that she has enough grounds upon which the court can find in her favour on the issue of trust. It is unfortunate but this is a court of law which must decide the case on the evidence and the law.

28. For the above reasons, the Plaintiff’s Originating Summons dated 21/11/2012 is declined and is hereby dismissed. There will be no order as to costs.

Dated and delivered at Kakamega this 10th day of March, 2015

E. C. MWITA

JUDGE