



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 27 OF 2009

FLORENCE CHERUGUT.....PLAINTIFF

VERSUS

CHEPTUM MUREI ANNAH.....DEFENDANT

J U D G M E N T

The plaintiff, Florence Cherugut, claims against the defendant, Cheptum Murei Annah, title to a parcel of land known as L.R. No. Kitale Municipal Block 15/Koitogos/1956 by way of adverse possession and pursuant to the originating summons dated 20th February, 2009, the plaintiff seeks a determination of this court as to whether;-

1. The plaintiff has acquired title to the said parcel of land by way of adverse possession.
2. The plaintiff has been in quiet and uninterrupted possession of the said parcel of land for an aggregate period of and/or exceeding twelve (12) years.
3. The defendant's title to the said parcel of and has been extinguished.
4. The plaintiff should be registered as the absolute owner of the said parcel of land.

The grounds in support of the summons are that the plaintiff has been in possession of the suit land from the year 1991 to the time of filing suit. That, she has had quiet and uninterrupted possession of the land for a period amounting to and exceeding 12 years and has continued to be in adverse possession thereof since 1991 and is therefore entitled to be registered as absolute proprietor thereof. That, her entry into and possession of the land was openly and/or publicly done such that the defendant has been continuously disposed of the land for a period exceeding 12 years. That, she has acquired an indefeasible title to the land thereby extinguishing the defendant's title to the land.

The foregoing grounds are fortified by the facts contained in the plaintiff's supporting affidavit dated 20th February, 2009, and further supporting affidavit dated 29th September, 2009 in which the plaintiff reiterates that she has been in an open and public possession of the suit property since 1991 and that the possession has been quiet and uninterrupted. The plaintiff contends that the defendant's occupation of the land was discontinued when she made an effective and open entry into the land and took possession thereof in the year 1991. She avers that the land was initially part of land known as Kitale Municipality Block 15/Koitogos/144 but was sub-divided thereby creating the suit property which to the defendant's knowledge has at all material times been in her occupation and possession.

The plaintiff contends that her entry and occupation of the suit land was adverse and since the defendant has never made an effective assertion over it and/or denounced her entry, occupation and possession, she has acquired an indefeasible title to the land and is therefore entitled to be registered as the absolute owner.

The plaintiff also contends that the defendant's title to the land has since been extinguished and therefore prays for an order that she has acquired by way of adverse possession an indefeasible title to the land.

In a replying affidavit dated 11th September, 2009, the defendant avers that she is the registered proprietor of the suit land and contends that the allegations made by the plaintiff are false and intended to mislead the court. She further contends that the plaintiff has never been in occupation of the suit land and avers that the land merely neighbours a parcel of land belonging to the plaintiff. She goes on to aver that the first time she came into contact with the plaintiff was in the year 2004 when she (plaintiff) and husband appeared at the land control board alleging that they had purchased the suit property and wanted it transferred to them. That, she has never allowed nor condoned the plaintiff intention to take possession of the property and any attempts by her to enter the property has been disputed such that she has had to make several reports to the area chief. That, in the year 2006, the plaintiff through her son ferried building materials into the property and through her (defendant's) intervention, the material was removed. That, the plaintiff and her family have been threatening to kill her and their attempts to rid her of the property has been met with resistance such that their alleged possession of the property has neither been open nor uninterrupted. In any event, the alleged possession has been for a period not in any way neared twelve years as alleged.

The defendant contends that the plaintiff's application is tantamount to reaping where the plaintiff has not sown and is premature and bad in law. It is for all the foregoing reasons that the defendant opposes the application which was heard by way of "viva -voce" evidence as directed by the court on the 11th July, 2011.

In her testimony the plaintiff (PW1) stated that on 6th August, 1991 a lady called Fatuma Noor offered to sell to her two (2) acres of land at a consideration of Kshs.130,000/=. The land neighbored her homestead. She agreed to purchase it. A sale agreement (P. Ex.1) was executed. It gave the description of the land as LR. NO. 1555/3 registered in the name of the defendant measuring 36.6.acres of which two (2) acres belonged to the said Fatuma Noor.

The plaintiff completed payment of the purchase price in November, 1991. She produced the necessary receipts (P. Ex.2) and the letter of completion (P. Ex.3) and stated that she took possession of the land immediately after completion of the sale transaction. She found semi – permanent structures on the land. She instructed her employee one Etyang to stay on the land and take care of her livestock. She rented the semi – permanent structures to one Jackson and one Eunice. She also cultivated the land and planted beans and trees. She produced rental receipts (P. Ex.4) and went onto state that the larger portion of the land described as LR NO. 1555/3 was sub-divided thereby giving rise to land known as plot No.144 from which two (2) acres were hived and given the description plot No. 1956 which was the portion purchased from Fatuma Noor.

The plaintiff contended that Plot No. 1956 was the land purchased by her from Fatuma Noor and which the defendant registered in her own name despite her (plaintiff's) protest.

The plaintiff stated that a dispute arose between her and the defendant over the said Plot No. 1956 (the suit property). She pointed out a sub-division plan dated 16th July, 2003 (P. MFI 6) and said that it identified the portion of land purchased by and belonging to her. She contended that the defendant that the defendant dismissed her and refused to allow her register the land in her name. She therefore filed a complaint with the land Registrar who conducted proceedings in respect thereof and rendered a decision in the year 2009.

The plaintiff stated that the land is still in her occupation and that she has conducted her activities thereof since November, 1991 even though the defendant obtained a title to the land on 21st December, 2008. She is now claiming the land from the defendant and prays for the issuance of a title deed in her name in respect thereof. She displayed photographs (P. MFI 8) and said that they show the development and plants in the land as well as a semi-permanent house and toilet.

The plaintiff's husband, **Reuben Butaki (PW 2)**, confirmed that the suit land was purchased in 1991 from Fatuma Noor who had initially purchased the same from the defendant. He said that the land was part of a larger portion which was sub-divided but during the sub-division, the plaintiff was left out. They (PW 2) and wife (PW 1) raised a complaint in respect and were informed that they would be given the portion given to the defendant. However, the defendant declined to take that to the land control board despite their several requests.

Butaki (PW2), went on to state that in the year 2003, the defendant engaged surveyors with a view to sub-dividing the land but despite their request, the defendant declined to include them in the sub-division and instead disowned them saying that she did not sell the land to them. It was then that they referred the matter to the land office where the defendant admitted having sold a portion of her land.

Butaki contended that they have been in occupation of the disputed land for twenty three (23) years during which time they have carried out developments thereon and planted trees. Further, they have tenants on the land.

Fredrick Makase Chemen (PW3), said that he was a neighbour to the plaintiff and confirmed that the material parcel of land was purchased by the plaintiff from Fatuma Noor wife to Shah Mohamed in the year 1991. He said that the plaintiff and the defendant lived peacefully until the time when the plaintiff demanded the title to the land from the defendant. He said that at all material times, the plaintiff kept the land into use by cultivating crops and planting trees thereon. He confirmed that the land neighbours that belonging to the plaintiff described as plot No. 341.

Jackson Biayo (PW 4), said that he has been a tenant of the plaintiff since July, 2011 and has been paying rent to her.

In her testimony, the defendant (DW1), said that the plaintiff was known to her as a distant neighbour and that what she (plaintiff) stated here in court was not truthful. She (defendant) said that she was the owner of a parcel of land measuring forty (40) acres of which ten (10) acres was hived off at a later stage. She denied that the plaintiff purchased part of the land from her and contended that she had never been involved in any land transaction with the plaintiff. She also denied that part of her land was purchased from Fatuma Noor by the plaintiff and contended that if there was a sale agreement between the two, she was not involved and knew nothing about it. She further denied that the plaintiff has been in occupation the land since 1991 and contended that it was only after the filing of this suit that the plaintiff kept some people in the land otherwise the land is unoccupied by anybody.

The defendant maintained that the suit land belongs to her and is used by her. She contends that the plaintiff has laid claim on land not belonging to her and for that reason the matter was referred to the land Registrar who informed her (Plaintiff) that the land did not belong to her. The defendant said that the matter was also referred to the area chief but was never resolved as the plaintiff failed to appear before the chief. She (defendant) said that the trees she planted on the land were cut off by the plaintiff who is not entitled to the land by adverse possession as alleged as she has never occupied the land for more than twelve (12) years and only entered thereon when she filed the present suit in court. The defendant contended that the two houses on the land were not erected by the plaintiff but one Shah Mohamed to whom she had leased the land.

Shem Kibitok Saye Anai (DW2), is the Assistant chief of Kibomet sub-location in Kitale. He said that he was known to both the plaintiff and the defendant and confirmed that the two have

been involved in a protracted dispute over the suit property which belongs to the defendant. He said that the disputed has been in existence for about ten (10) years and was prompted by a claim by the plaintiff that she purchased part of the suit property from one Shah Mohamed.

He (DW2) knew the said Shah Mohamed and that he had died sometimes ago and so did his wife. He said that Shah Mohamed and his wife had agreed to purchased part of the defendant's land (i.e the suit property). He contended that the land is currently not being utilized by either the plaintiff or the defendant and confirmed that it belongs to the defendant and has a building hereon which was purchased by the defendant together with the entire portion of land.

The chief denied that the land is occupied by the plaintiff and that her workers are thereon. He also denied the suggestion of the plaintiff that he is related to he defendant and contended that he has never assisted her (defendant) in this dispute.

It is apparent from the foregoing evidence and the pleadings that the legal ownership of the suit property by the defendant is not disputed and that the bone of contention is the alleged occupation and/or possession of the property by the plaintiff for an uninterrupted period of twelve (12) years and above with the full knowledge of the defendant after she allegedly sold the property to a third party, one Fatuma Noor, who is said to have in turn sold the property to the plaintiff in the year 1991, thereby allowing her entry thereto.

The later transaction between the said Fatuma Noor and the plaintiff was depicted in a sale agreement produced herein (P. Ex. 1). The plaintiff is thus claiming ownership of the suit property by way of adverse possession. Her contention is that she took possession of the property in 1991 after purchasing it from Fatuma Noor and has remained in occupation thereof since than. She indicated that her employees and tenants have been on the land throughout. However, her claim of ownership was disputed by the defendant who contended that the land belongs to her to date and that the sale agreement entered between the plaintiff and Fatuma Noor had nothing to do with her. She further contended that at one time, she offered the property for sale to one Shah Mohamed, husband to the said Fatuma Noor but the intended sale did not materialize thereby prompting her to refund to refund to Shah Mohamed a sum of Kshs.40,000/= paid upfront.

The defendant did not agree that she had allowed the plaintiff to freely occupy the land she contended that she has always put up resistance to the plaintiff's occupation of the land and her (plaintiff's) claim of ownership such that the matter had to be referred to the land Registrar and the local administration through the area chief.

Indeed, a copy of the proceedings before the Land Registrar was produced by the plaintiff (i.e P. Ex.7). It is dated 20th August, 2009, whereas this suit was filed on 23rd February, 2009 meaning that the dispute was presented before the registrar after the filing of the suit. In any event, the dispute related to a caution placed on the land by the plaintiff which caution was upheld in the registrar's decision made on 10th March, 2010. The registrar directed the parties to resolve the matter on their own or refer it to the court.

Herein, the defendant insisted that the suit property has never been occupied by the plaintiff and that the only time she did so was when she took her people into the land after this suit was filed.

The defendant clarified that the structures on the land were erected by Shah Mohamed who had leased the land from her.

Basically, the issue for determination is whether the sale agreement entered between th plaintiff and Fatuma Noor was valued for purposes of conferring a right of entry into the suit property by the plaintiff and whether in fact the plaintiff entered the land by virtue of the agreement and took possession thereof for a period exceeding twelve (12) years with the knowledge of the actual title holder (i.e the defendant) whose rights in respect thereof became treatable as having been extinguished. In effect, the doctrine of adverse possession presupposes that a claimant has been

in open uninterrupted and exclusive possession and use of land for a period at least 12 years either after dispossessing the owner or by discontinuation of possession by the registered owner on his/her own volition (See, **Kosuve Vs. Mwaani Investments Ltd & other (2004) 1 KLR 184**).

Herein, the plaintiff implied that she dispossessed the defendant of the suit land when she purchased the same from Fatuma Noor and took possession immediately thereafter.

The material sale agreement (P. Ex. 1) however indicates that the agreement was between Fatuma Noor as the vendor and Micheal Ruto and Florence Cherugut (plaintiff) as the purchasers. The agreement also indicated that the property on sale was two (2) acres of a portion of land described from a portion measuring 36.6. Acres belonging to the defendant.

Interestingly, the agreement was never signed by any of the purchasers. Instead, it was signed by one R. Butahi as the purchaser. Presumably, the said R. Butahi as the plaintiff's husband Reuben Butahi (PW2).

In view of the forgoing, the alleged ownership of the suit land by Fatuma Noor was doubtful. She was therefore not able to sell what did not belong to her to the plaintiff or her husband. Also the land she was purportedly selling may not have been the suit property but another portion of land and if it was indeed the suit property then legal ownership of the land had not been acquired by the defendant who in accordance with the green card

(P. Ex. 5 (b)) became the registered proprietor on 11th May, 2005 and was issued with a title deed (D. Ex.3) on 23rd December, 2008.

It is obvious that prior to the year 2005, the land did not lawfully belong to the defendant. She could not therefore have sold what did not belong to her to Fatuma Noor as alleged by the plaintiff.

Since the plaintiff purchased from Fatuma Noor, some land whose description and ownership was in doubt, the remedy for the plaintiff lay with the said Fatuma Noor and not the defendant who became the legal owner of the suit property in the year 2005 whereas the transaction between the plaintiff and Fatuma Noor occurred in the year 1991 which in relation to the defendant is irrelevant and can not therefore be herein applied to calculate the number of years that the plaintiff has allegedly occupied the suit property. Consequently, the plaintiff can not be heard to lay claim over the suit land on account of adverse possession. This can only be done after the expiry of twelve (12) years from the year 2005 thereby rendering this suit premature.

By the same token, the fact that the plaintiff has occupied, whether directly or indirectly, the suit property since 1991 to the date of filing this suit and beyond and the fact that some old structures on the land were leased to tenants by the plaintiff are irrelevant and so is the fact that the defendant had leased the land to Shah Mohamed, husband to Fatuma Noor. None of the foregoing transactions was material for purposes of the doctrine of adverse possession purely because ownership of the property was not at the material time visited in the defendant. Any dispute arising between the plaintiff and the defendant over the suit property prior to the year 2005, was not merited as none of them was the legal owner of the property at the time.

In sum, the sale agreement (P. Ex.1) was an invalid document from the beginning and as such, could not be used by the plaintiff to measure the time that she has allegedly been in occupation and/or possession of the suit land viz-a-viz the defendant. Her alleged entry into the and from 1991 was of no consequence in relation to the defendant who became the registered proprietor in 2005 thereby rendering the plaintiff a trespasser from that period onwards since the defendant's rights over the property remain intact and have not been extinguished as yet.

This suit was indeed premature and therefore lacks merit for the grant of the orders sought by the plaintiff in the originating summons.

In the end result, the suit is dismissed with costs to the defendant.

J. R. KARANJA,

JUDGE

11/02/2014

(Delivered and signed this 11th day of February, 2014).