



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 313 OF 2012 (O.S)

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CHAPTER 22

AND

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF
LIMITATIONS OF ACTION ACT**

BETWEEN

MAGABE CHACHA JOSEPH PLAINTIFF

VERSUS

JOSEPH BOGERE KERARIO DEFENDANT

JUDGMENT

1. By an originating summons dated 14th August 2012 brought under order 37 rules 7 and 14 of the Civil Procedure Rules and section 38 of the Limitations of Actions Act, the plaintiff herein Magabe Chacha Joseph moved this court for the following orders:
 - a. **A declaration that the defendant's rights to recover a portion measuring 2.4ha of LR No. Bugumbe/Mabera/963 (hereinafter referred to only as "the suit property") is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.**
 - b. **There be an order that the plaintiff be registered as the proprietor of the portion measuring 2.4ha of suit property in place of the defendant.**
 - c. **There be an order restraining the defendant either by himself, or through his agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said portion measuring 2.4ha of the suit property in any manner whatsoever.**
 - d. **Costs of this originating summons be borne by the defendant.**
 - e. **Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.**
2. The originating summons was brought on the grounds that were set out in the body thereof and in the affidavit of the plaintiff sworn on 14th August, 2012. In the said grounds and affidavit the plaintiff averred that; on or about September 1999 the defendant approached him with a request to

- purchase a portion of the suit property. He conducted an official search whereby he established that the suit property belonged to the defendant. On 20th September 1999 he entered into a sale agreement with defendant whereby the defendant sold to him a portion measuring 2.9ha of the suit property. Upon entering into the said agreement, he took possession of the said portion measuring 2.4ha and commenced cultivation of the same. The defendant sought for and obtained the requisite land control board consent to sub-divide and transfer the said portion of the suit property to his (the plaintiff's) name. On obtaining the said letter of consent, the suit property was indeed surveyed and a mutation was prepared culminating into the determination of the exact boundary location over and in respect of the 2.4ha. that was sold to him by the defendant.
3. The foregoing notwithstanding, the defendant failed to transfer the said portion of the suit property to him (plaintiff). He however remained in occupation and possession of the said portion of the suit property for a period in excess of 12 years having taken possession of the same in the year 1993. The defendant did not take any steps to interfere with his physical possession/occupation of the said portion of the suit property except for the legal proceedings which the defendant instituted against him on 25th June 2012 at Kehancha Senior Resident Magistrate's court in SRMCC No. 19 of 2012 which was mounted long after the expiry of the statutory 12 years period. The plaintiff contended that due to the fact that he had been on the suit land for over 12 years, without interruption, the title of the defendant in respect of the portion of the suit property measuring 2.4ha. lapsed or stood extinguished.
 4. The defendant filed a memorandum of appearance through the firm of Omondi Kisera & Co. Advocates but did not file grounds of opposition or replying affidavit in opposition to the application. When the matter came up before me on 28th January 2013 for directions it was agreed by the parties that the originating summons shall proceed by way of viva voce evidence. The matter was thereafter listed for hearing on 10th July 2014. The defendant's advocates were served with a hearing notice but neither the defendant nor his said advocates turned up in court for the hearing. After satisfying myself that the said advocates for the defendant were served as aforesaid, I allowed the plaintiff's advocate to proceed with the hearing. The plaintiff gave evidence and did not call any witness. He told the court that the defendant was known to him since they came from the same area. He reiterated the contents of his affidavit in support of the originated summons that I have highlighted herein above. He reiterated that defendant sold to him a portion of the suit property measuring 2.4ha. He produced in evidence a copy of the register for the suit property which shows that the suit property is registered in the name of the defendant. He also produced a copy of a certificate of official search in respect of the title of the suit property which was marked as P.exb 2. He told the court that the agreement for sale between him and the defendant was in writing and that the same was made before the area chief on 20th September 1999. He produced a copy of the said agreement in evidence as P.exh. 3.
 5. The plaintiff told the court further that, after purchasing the said portion of the suit property, he took possession and commenced farming activities thereon. He planted maize, sweet potatoes, bananas and cassava on the said portion of the suit property. All this time, he did not have any dispute with the defendant over the sale of the said portion of the suit property or his occupation thereof. He produced in evidence photographs to show what he had planted on the said portion of suit property as P.exb. 4 (a), (b), (c) and (d). He told the court that the boundary of the portion of the suit property that was sold to him by the defendant was marked from the remainder of the suit property by sisal plants. The plaintiff stated that after the sale, they went with the defendant to the Land Control Board for the necessary consents. The said board approved the sub division of the suit property so that the portion that he had purchased could be transferred to him. He produced in evidence a copy of the application that they made to the board and the consent that was issued by the board. The same were marked as P.exbs. 5 and 6 respectively.
 6. On obtaining the said consent the suit property was surveyed and a mutation prepared for the purposes of subdivision. He produced a copy of the mutation form dated 18th June 2001 which was marked as P.exh. 8. After subdivision of the suit property was completed the defendant changed his mind on the transaction and sought to refund the purchase price to him. The defendant at the same time stopped him from cultivating the said portion of the suit property and lodged a complaint against him before the area chief. The matter was deliberated upon by the clan elders at the chief's office. The elders returned a verdict that he (the plaintiff) had lawfully purchased the

- disputed portion of the suit property. He produced the decision of the elders dated 7th November 2011 as P.exh. 9.
7. The defendant was dissatisfied with the decision by the chief and the said elders and proceeded to file a suit against him at the Resident Magistrate's Court at Kehancha in Kehancha SRMCC No. 19 of 2012. He produced a copy of the plaint that was filed in the said suit in evidence as Pexh. 10. After losing the case before the chief, the defendant and members of his family entered the disputed portion of the suit property and cut down banana plants that he had planted thereon. The plaintiff told the court that he has not used the disputed portion of the suit property since the year 2011 when the defendant prevented him from accessing the same. Each time he has made attempts to access the property, the defendants and his agents have always chased him away.
 8. On examination by the court, the plaintiff reiterated that he cultivated the disputed portion of the suit property from the year 1999 up to the year 2011 when he was prevented by the defendant from accessing the same. I have considered the plaintiff's originating summons, the affidavit filed in support thereof and the evidence that was tendered by the plaintiff at the trial. The only issue that arise for determination is whether the plaintiff has proved that he has acquired title to a portion of the suit property measuring 2.4ha. by adverse possession. The doctrine of adverse possession in Kenya is embodied in the Limitations of Actions Act, Chapter 22 Laws of Kenya(hereinafter referred to only as "the Act") and in case law. Section 7 of the Act 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"**.
 9. The Court of Appeal in the case of **Wambugu vs. Njuguna [1983] KLR 172** stated as follows:-

"First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated the 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 disposed 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."

In **Dr Ojienda's Principles of Conveyancing Hand Book, Law Africa Vol II** at page 97 the learned author has stated that:

"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission the occupation can only be either with permission or adverse, the two concepts cannot co-exist."

Similar sentiments were also echoed in **Public Trustee and Another Vs. Wanduri [1976-1985] E. A 488** where Kneller J. A observed that:

"The absent registered owner always retains the legal estate and this prima facie entitle him to resume possession from anyone in possession or actual occupation from the date (thereof) but if he does not exercise it he may not bring an action to recover the land after the end of twelve years."

In **Jandu vs. Kirpal [1975] E. A 225** Chanan Singh J. stated that:

"The rule on 'permissive possession' is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land".

In the Court of Appeal case of **Githu vs. Ndeete [1984] KLR 776**, it was held that;

“ A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title.”

10. It is on the foregoing principles that the plaintiff's claim herein falls for consideration. In the instant case, the evidence of the plaintiff is not rebutted since the defendant did not file an affidavit in opposition to the originating summons. According to the evidence tendered by the plaintiff the suit property was at all material times and still is registered in the name of the defendant. He entered into an agreement with the defendant in which the defendant agreed to sell and he agreed to purchase a portion of the suit property measuring 2.4ha. The agreement for sale was made on 20th September 1999. The plaintiff took possession of the said 2.4ha of the suit property immediately thereafter and began cultivating the same. The suit property is an agricultural land. The sale and transfer of a portion thereof required the consent of the land control board pursuant to the provisions of the Land Control Act, Chapter 302 Laws of Kenya. Under section 8 of the Land Control Act aforesaid, the parties ought to have applied for such consent within a period of 6 months from the date of the agreement for sale unless the time was extended by the High Court failure to which the agreement for sale became void for all intents and purposes.
11. From the evidence on record, the defendant applied for the consent of the land control board to sub-divided the suit property on 23rd February, 2000 and the consent to sub-divide was granted to him by the board on 3rd March, 2000. Thereafter the defendant seems not to have proceeded with the subdivision of the suit property immediately. According, to the evidence on record, the mutation for the subdivision of the suit property was not prepared until 18th June, 2001 more than 1 ½ years after the agreement for sale. The mutation itself was not registered. The consent that was obtained by the defendant was for the sub-division of the suit property. In addition to this consent, the defendant had a duty to obtain another consent to transfer the portion of the suit property that was sold to the plaintiff to the plaintiff. The defendant neither applied for this second consent nor obtained it. As I have stated above the defendant was under a duty to apply for this consent within 6 months from the date of the agreement for sale unless the time was extended by the High Court. The defendant should therefore have applied for the said consent by 20th March, 2000. Since the defendant did not apply for and did not obtain the requisite consent to sell and transfer the disputed portion of the suit property to the plaintiff, the agreement for sale between the plaintiff and the defendant stood void for all intents and purposes as from 20th March, 2000. The plaintiff had no right to continue occupying the suit property after that date. From 20th September, 1999 up to 30th March, 2000, the plaintiff occupied the suit property by consent of the defendant pursuant to the terms of the said agreement for sale. After the said agreement for sale was voided by operation of law on 20th March, 2000, the defendant became entitled to resume possession of the disputed portion of the suit property.
12. For the purposes of the Limitation of Actions Act aforesaid, the time started running against the defendant on 20th March, 2000. The burden was on the plaintiff to prove that he continued with occupation of the disputed portion of the suit property openly, continuously and without any interruption by the defendant for a period of at least 12 years from 20th March, 2000 aforesaid to be entitled to claim the said portion by adverse possession. From the evidence on record, I do not think that the plaintiff has made out a case for adverse possession. According to the evidence on record, the defendant changed his mind in the year 2011 and refused to complete the agreement for sale. At the same time, the defendant denied the plaintiff entry into the suit property thereby dispossessing him of the disputed portion thereof that he had occupied pursuant to the said agreement for sale. The plaintiff told the court that his occupation of the disputed property ended in the year 2011 when he was prevented by the defendant from entering the said property. In the case of **Githu vs. Ndeete** (supra), it was 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 adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land.”** By denying the plaintiff entry into the suit property in the year 2011, the defendant asserted his right to the portion of the suit property that he had sold to the

plaintiff. The time to recover the suit property that had started running against him on 20th March, 2000 ceased to run from the date he prevented the plaintiff from accessing the suit property.

13. It follows from the foregoing that for the purposes of Limitation of Actions Act, the plaintiff's occupation of the disputed portion of the suit property was adverse to the defendant from the year, 2000 to the year, 2011. The defendant did not therefore occupy the suit property for a sufficient period that would have entitled him to claim the same by adverse possession. As I have stated above, the period between 20th September, 1999 and 20th March, 2000 cannot be included in the computation of the 12 years because the plaintiff occupied the suit property during this period with the consent of the defendant. His occupation was therefore not adverse to the defendant. In the case of **Mutiso vs. Mutiso [1998] LLR 3268 (AK)** adverse possession was defined as;

“Possession inconsistent with the right of the owner. But not for instance possession under licence from the owner or by way of trust on his behalf. There must be denial of the owners title in one form or another for possession to be adverse.”

14. I am of the view for the reasons given above that the plaintiff has failed to establish a claim over the suit property based on adverse possession. The plaintiff's suit cannot therefore succeed. Consequently, the originating summons dated 14th August 2012 has no merit. The same is accordingly dismissed with no order to costs.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the Applicant

N/A for the respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE