



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Suit 76 of 2004

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP. 22

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP. 300

KOBILO KIPTOO suing as the administrator of the Estate of

JONATHAN KIPTOO KIRUI.....1ST PLAINTIFF

ISSAC KIPROTICH KIPTOO.....2ND PLAINTIFF

VERSUS

PHILIP KIPTANUI CHEBOS.....DEFENDANT

JUDGMENT

The Plaintiffs presented a suit through an Originating Summons under the provisions of Order XXXVI Rules 3D and 7 of the Civil Procedure Rules and Section 38 of the Limitations of Actions Act. They sought the following orders:

- 1. THAT the interests of the Defendant have been extinguished by lapse of time.**
- 2. That the Plaintiffs have acquired title by adverse possession of 2.8 Ha of the piece of land known as MOSOP/METKEI/452.**
- 3. That the land register relating to the aforesaid be rectified to reflect the Plaintiff as the owner thereof and any title documents issued be delivered to the court for cancellation.**
- 4. That the hounarable court be pleased to order the Defendant to effect transfer of the said parcel in favour of the Plaintiffs.**
- 5. That the Court be pleased to make such other order or further orders as may deem appropriate.**
- 6. That costs be borne by the Defendant.**

The First Plaintiff is the widow and administratrix of the estate of the late Jonathan Kiptoo Kirui

(deceased). In her affidavit in support of the suit she depones that he late husband sometimes in 1973 purchased the suit property MOSOP/METKEI/452 from the Defendant. That a sale agreement was executed. That they took possession of the suit property and started developing it. She avers that the Defendant has despite promises refused to transfer the suit land to her name.

She prays that the Court do declare that she has become entitled to the suit land by adverse possession and an order be given directing the Land Registrar to effect transfer of the said parcel in her name. The Plaintiff has exhibited a certificate of official search dated the 21st day of January 2004

The Second Plaintiff is the son of the 1st Plaintiff and Jonathan Kiptoo Kirui (deceased). In his affidavit in support of the suit adopts the averments in the affidavit of the 1st Plaintiff, his mother. He further depones that he was in occupation of the suit land since 1973. That his occupation was open, continuous and uninterrupted and without permission from the Defendant, hence have acquired the said land by adverse possession.

The Defendant has filed a Replying Affidavit dated 31st August 2004.

The Defendant admits to have entered into a sale agreement with Jonathan Kiptoo Kirui (deceased) for the sale of that parcel of land known as MOSOP/METKEI/452. He avers that he changed his mind later and informed the deceased. That he later agreed verbally he will grant the deceased permission to graze his livestock in consideration for the money paid. That it is based on this agreement that the deceased occupied the land. That since the deceased occupied the land with his permission a claim for adverse possession cannot be maintained against him.

The Defendant further avers that it was not until the death of the deceased Jonathan Kiptoo Kirui in 1999 that the Plaintiff and other members of the Deceased started making forcible entry into the suit land. That it was on the 27th and 28th of November 1999 that one Edward Kirui entered the suit property and erected a house and occupied the same. That he immediately instructed his advocates to write a demand letter which was not heeded and filed a suit being Eldoret CMCC No. 808 of 2000. That Edward entered appearance but did not file a defence and default judgment was entered in his favour. That the 1st Plaintiff consequently instructed advocates to file an application to make her a party in the suit but the said application was subsequently withdrawn.

The Defendant depones that he asserted his rights by filing the above suit and the fact that the deceased lodged a caution he knew that he had no intention of transferring the property to him. The Defendant states that a deceased person claim over the suit property is extinguished by virtue of the provisions of the Limitations of Actions Act. That since the consent of the land control board was not sought or obtained no claim existed in favour of the deceased. He prays that the originating summons be dismissed with costs.

The court gave directions directing that hearing of the Originating Summons shall be by Viva Voce evidence.

PW 1 was the second Plaintiff Issack Kiprotich kiptoo. He stated the he is a professional Teacher with his own school called Atlas Academy in Turbo. He states that the 1st Plaintiff is his mother. He was born in 1967 on a piece of land adjacent to the suit land. That his father bought the suit land more than 30 years ago. That they have never been asked to leave the suit land by the Defendant and the Defendant has never set foot on that land; that the only time he saw the Defendant was when there was a case in the village. He states that his father passed away in 1999. PW1 produced the Memorandum of Agreement Marked as “**exhibit 1**”. He further stated that his father put a caution on the land on 4.11. 1987 which is still on record. That the village elders in the dispute over the land ruled in favour of his father. He produced a certificate of official search and marked as **Exhibit No. 5**. He states that the Defendant has refused to transfer the land. He states that he is not aware of Eldoret CMCC. 808 of 2000. That Edward was his younder brother, he died in 2002. That he is not aware of any licence granted to his father to use the land temporarily. That the Defendant has never refunded the purchase price.

On cross examination by the Counsel for the Defendant PW1 stated that it is not true that Edward entered the property for the first time in 1999 but he improved the facilities from grass thatch to Mabati. He stated that he occupied the land since he was a child. He stated that he based his claim on the sale agreement. He stated that the land adjacent was registered in the name of his father and the two plots have no boundaries and are treated as one.

PW2 was the 1st Plaintiff Kobil Kiptoo. She gave her evidence in Keiyo language and was translated by Emmanuel Kirui Chesire. She stated that she lives in Kapkitoi in Kamaoie location. She is a farmer and looks after her cattle. She states that she knows the Defendant who sold to them land. The land is in Kipchaeni. The land is 6 acres known as MOSOP/METKEI/452. That they bought the land in 1973, although she does not know the amount there was a document. That they were cultivating the land and herding their cattle. They had another land near the suit property. That the Defendant has not interfered with their use of the land but he refused to give her the title. She states that she prays the court to order the Defendant to give her the title to the land, that they are not tenants or licensees. That she has been on the land for over 20 years.

PW2 further stated that they own 3 pieces of land, 2 are adjacent to each other and that she lives on 452. That her husband was buried to the land adjacent to the suit property. That after the deceased died they demolished the old house and built a new one. She says she does not remember when they first built on the suit land. She stated that she did not know her husband had lodged a caution on the land.

PW3 was Wilfred Toroitich. He states that he lives in Kapkitony sub-location, Maoi Location of Metkei Division. He states that he is the chief of Maoi location for 10 years. He was previously the Headmaster of Kitigoi Primary school. He states that he knows the Defendant who is a member of his location and has known him all his life. He stated that he has 2 farms No. 447 and 453 which borders 452 the suit land. He says that he bought his land in 1974 at that time Jonathan Kiptoo Kirui (deceased) was living in 452. He says he knows the entire family who are still his neighbours. PW3 was referred to the meeting of the elders of the 28.5.1996 to resolve the dispute. He confirmed that he did attend that meeting. His name is indicated as No. 12. He stated that in the meeting it was resolved that the Defendant sold the land to Jonathan Kiptoo Kirui (deceased) and should transfer it to him. He stated that there was a sale agreement and Kirui paid for the farm and the Defendant should transfer the property.

PW4 was Joseph Kiprotich Kipsang. He states that he is a retired assistant chief of Kapkitony sub-location. He was chief for 14 years and knew the late Jonathan Kiptoo Kirui (deceased) who was resident in the area. He stated that he knew the Defendant. He stated that he received a complaint from Jonathan Kiptoo Kirui (deceased) that the Defendant sold to him his land but refused to transfer the same to him. He stated that he sent a letter to the Defendant to attend a meeting of elders to resolve the case. The Letter was marked as **Exhibit No. 4**.

PW4 also referred to the minutes of the Meeting held on the 28.5.1996 where it was resolved that the Defendant should give title to Jonathan Kiptoo Kirui (deceased). The minutes were produced as **Exhibit no. 2**. He stated that the Defendant was annoyed with the decision of the elders and he left.

PW4 was also referred to a letter dated 2.2.2000. he stated that he wrote the letter to the widow because Jonathan has died. This was in an effort to conclude the case he stated. He states that he summoned the Defendant to the meeting. The letter was marked as **Exhibit No. 3**.

PW4 testified that land was cultivated by Jonathan (deceased), he also had developed a house on the land where he lived. He stated that the deceased children are still using the land he stated that he did not see the Defendant use or occupy the land since he sold it. He also stated that the deceased had an adjacent land to the suit property.

After the testimony of these four witnesses the Plaintiffs closed their case.

DW1 was Johnstone Ndambuki Muli. He stated that he was an employee of the judiciary as an executive assistant at the Chief Magistrates Court in Eldoret Civil registry. He produced a file No. CMCC

808 of 2000 with Kiptum Chebos as the Plaintiff against Edward K. Kirui as the Defendant. He stated that the suit was filed on the 13th July 2000. He produced the court file as **DW-Exhibit No.1** he stated that there was a decree given on the 5.2.2002.

DW2 was the Defendant Kiptanui Chebos. He states that he knows the Plaintiff's, they were his neighbours. He also knew the deceased Jonathan Kiptoo Kirui who died in 1999. He states that he left his farm to him in 1973. That he was intending to sell to him but later changed his mind in 1974. They had an agreement. That testified that he received Kshs. 4000/= and there was a balance of Kshs. 1000/= but he did not receive the balance neither was his wife given the balance. That at the time of the agreement he did not have title he got it later in 1974. He stated that he changed his mind because of his children. He confirms that he did not pay back the purchase price but he was asked by the deceased to be allowed to graze his cows on the land which he agreed. He stated that he told the deceased he could graze the land but his children could go to the land and he had to leave. He stated that he did not give him notice in writing. He states that in 1980 he told his sons to go and build on the land, one was Nahashon and the other was Kibet. They were to build a house but neither built any house because their mother was sick.

DW2 stated that he did not know about the caution against the land. He states that in 1996 he was called by the chief and Jonathan was called. He found a *baraza* full and the chief said it was about the land. They said Jonathan wanted the land but he refused.

DW2 further testified that the land was vacant and only Jonathan was grazing some cows on the land. He stated that after the death of Jonathan, Edward built a house on the 27.11.99. Through his advocates he wrote a demand letter **Exhibit No. D4** to remove the house which demand was not complied with and he then sued Edward in CMCC No. 808 of 2000. He stated that the Court decided in his favour but before the eviction Edward died. He stated that Jonathan was a licensee and he did not sue the other family members because it only Edward who built on the land.

On cross-examination DW2 testified that there was one witness to the sale agreement, Samuel Kiptoo. That he did not receive the balance of Kshs. 1000.

The Defendant thereafter closed his case.

By consent the parties advocates agreed to file and exchange written submissions.

In his submissions counsel for the Plaintiffs reiterated the issues in the pleadings and the testimony of the Plaintiffs. Counsel submitted that the suit land MOSOP/METKEI/452 currently registered in the name of the Defendant. that the Defendant had sold the land to the husband of the 1st Plaintiff in 1973 and at the time of acquiring the title deed in 1974 he knew he was not the owner of the land. Counsel submitted that the Plaintiffs tendered evidence that they had been residing in the suit land since 1973 after it was purchased by the deceased husband of the 1st Plaintiff. That the Plaintiffs have fully developed the land erecting houses, farming, growing trees and are keeping animals. That the Plaintiffs have enjoyed peaceful occupation. Counsel further submitted that in 1996 the husband of the 1st Plaintiff requested the area chief to call a meeting to settle the dispute over the land and the meeting unanimously passed that the land belonged to Jonathan Kirui, deceased. Counsel submitted that since the Defendant did not refund the purchase for the land which he acknowledged to have received his argument that he cancelled the transaction cannot hold any water. Counsel further submitted that the case CMCC No. 808 of 2000 was an attempt by the Defendant to stop the time required for adverse possession claim but already the 12 years lapsed since the Plaintiff's claim was from 1987 and were already on the land for about 28 years at the time of filing the suit. Counsel argued that if the Defendant was serious he would have removed the Plaintiffs from the land as soon as he acquired title.

Counsel for the Plaintiff in support of their adverse possession case submitted three authorities.

Counsel for the Defendant also filed written submissions. He attacked the suit by arguing that Order XXXVI Rule (2) requires summons must be supported by an affidavit to which a certified extract to the title of the land in question is annexed. Counsel in support cited the case of **Kasuve Vs. Mwaani**

Investments Limited & 4 Others [2004] 1 KLR where the court stated that identification of land in possession of the adverse possessor is an integral part of proving his claim for possession. In that case the court stated that the applicant annexed certificate of titles for subdivision. Counsel also cited the court of Appeal authority of **Kweyu VS. Omuto [1990] KLR 709** where the court held that originating summons which did not annex a certified extract of the title to the land was defective. Counsel argues that the Plaintiffs did not annex a certified extract as per the requirement above. He also states that the name indicated in Plaintiffs Exhibit No. 5 is Kiptanui Chebos whereas the Defendant has been sued under a different name.

The second limb of submissions of the Counsel for the Defendant was that the Plaintiffs are seeking rectification of title and have not invoked the right sections of the Registered Land Act to be registered as proprietors of the suit land. In support of this point counsel referred to the case of **Lali Swaleh & 3 Others Vs. Stephen Mathenge & 2 Others NAI Civil Appeal No. 132 of 1993** (Unreported).

The third point argued in the submissions of the Defendant is that of the capacity of the Plaintiffs. Counsel argues the 2nd Plaintiff cannot institute a suit on behalf of the estate of the Deceased because he does not have Grant letters of administration. The further argues that the 1st Plaintiff also lacks standing in that the person on whose behalf time could run as against the registered owner has died. He submits that there is nothing in the originating summons to show that the 1st Plaintiff is pursuing the claim on behalf of the estate of the deceased. Counsel states that the 1st Plaintiff cannot claim the suit property registered in her name when she has lodged the claim in her capacity as administratrix. Counsel in support cited provisions of section 122 and 125 of the RLA.

Counsel also submitted that the Plaintiffs were only using the suit land for grazing cattle and some form of cultivation and this does not amount to effective occupation. He in support relied on the case of **Jonathan O. Oyalo Obala & Ano. VS. Cornelius Otaya Okumu – Kicumu Civil Appeal No. 208 of 1997** (unreported) where the court held that the mere presence of crops on land may not that the grower of the crop is asserting claim of ownership to the land. Counsel states that the caution the deceased lodged against the title in 1987 claiming purchaser's interest was tantamount to acknowledging the title of the Defendant and whatever time that may have accrued to the deceased was to be disregarded in computing the limitation period. Counsel referred to the CMCC No. 808 of 2000 arguing that the orders were in rem and binding on the all and sundry including the Plaintiff. He states that although the decree in this suit was not executed it remains in force for 12 years.

Counsel rested his submissions by concluding that the Plaintiffs originating summons has failed to establish a case for adverse possession and should be dismissed with costs.

In the analysis of the facts of this case there is no dispute that the late Jonathan Kiptoo Kirui (deceased) entered into a sale agreement for the sale of the suit land the said agreement is produced as Plaintiff **exhibit No. 1 and is dated 18.2.1973**. The Defendant acknowledges this agreement and the fact that he received kshs. 4000 but he testified that the balance of kshs. 1000 that was to be paid to his wife was never paid. However it was the Plaintiffs case that this balance was paid to the Defendant's wife as per the agreement.

The Defendant in his testimony stated that he changed his mind on the sale of the land after 1 year and informed the deceased about it. He also testified that he has not refunded the kshs 4,000 paid to him in consideration of the sale.

Both parties also acknowledge that there was an effort through the assistant chief of the area in 1996 to settle the dispute over the land. This was after a complaint was lodged by the deceased. In the minutes of the meeting which has been produced in court by the assistant chief Joseph Kiprotich Kipsang PW4 as exhibit No. 2 the deceased told the elders that he paid the balance of kshs. 1000 to the Defendant's wife, the late Sara Kiptanui. The Defendant also told the elders according to this minutes that although he was paid kshs. 4000 and his wife had taken the remaining kshs 1000 he changed his mind because the money he had taken never bought what he had intended to buy and his wife told him that the

piece of land should not be sold. The elders after deliberations concluded that the Defendant was to give the land to the deceased.

I have no doubt that the land in question was in dispute for quite long time. According to the Defendant 1 year after he sold the land he changed his mind and informed the deceased accordingly. There is evidence that the deceased as early as 1987 has lodged a caution dated 4.11.1987 claiming purchasers interest. The Defendant also filed a suit in the chief magistrates court in 2000 being CMCC 808 of 2000 against Edward Kirui one of sons of the deceased.

What comes for determination before the court is whether the Plaintiffs have on balance of probability established a claim for adverse possession.

It is the Defendants case that the Plaintiffs' suit does not comply with the mandatory requirements of Order XXXVI Rule (2) which requires summons must be supported by an affidavit to which a certified extract to the title of the land in question is annexed. I have looked at the Originating Summons of the Plaintiffs. It does annex the official search of the suit property. The search is dated 21st January 2004 and is signed by the Land registrar. The search has been produced as Exhibit No. 5. The search clearly shows it refers to MOSOP/METKEI/452 which is the suit land. It gives the details of the owner as Kiptanui Chebos. It also shows that there is a caution dated 4.11.1987 by Jonathan Kiptoo Kirui Claiming Purchaser's interest. The rationale for requiring the certified extract according to me and as has been aptly put by the court in the case of **Kasuve Vs. Mwaani Investments Limited & 4 Others [2004] 1 KLR** is for proper identification of the subject land which the claimant for adverse possession occupies. I am satisfied that the official search serves this purpose and the Plaintiff's Originating Summons complies with the requirement of Order XXXVI Rule (2).

The Plaintiffs state that they have been on the suit land for more than 30 years. The Plaintiffs state that they have developed the suit land with houses, they planted trees and also keep livestock. The PW3 has testified that he owns a farm No. 452 next to the suit land (452) which he bought in 1974. He testified that at the time he bought the land the farm No. 452 was occupied by the late Jonathan Kiptoo Kirui (deceased). The deceased who owned an adjacent land must have started utilizing the suit land after he purchased it from the Defendant in 1973.

The Defendant states that 1 year after the sale of the land to the deceased he changed his mind and informed the deceased. In his testimony he states that he agreed with the deceased to continue using the land to graze his livestock until he sons will come to claim when he should give way. He testified that in lieu of the grazing rights he did not refund the money paid to him.

I am not convinced by the testimony of the Defendant. If he agreed to purchase the land for KShs. 5,000 I do not see as logical that a buyer will exchange the purchase price for temporary license to graze. This is further contradicted by the actions of the deceased who in 1987 lodged a caution against the suit land claiming purchaser's interest. I therefore reject the line of argument of the Defendant that the deceased was a licensee and was on the suit land with the permission of the Defendant.

The 2nd Plaintiff the widow of the late Jonathan Kiptoo Kirui (deceased) testified that she lives on the suit land. She stated that she has been there for over 20 years and her occupation was peaceful and was never interfered with. This is corroborated by the testimony of PW1 and PW3.

The Defendant argued that the person on whose behalf time could run was the late Jonathan Kiptoo Kirui (deceased). That upon his death time could not run and no action can be brought by the 2nd Plaintiff on behalf of his Estate. Further that the 2nd Plaintiff who does not have Grant of Letters of Administration has no locus to file this suit.

I am of the opinion that the 1st Plaintiff and 2nd Plaintiff claim is that they have been in occupation of the land since it was bought by the late Jonathan Kiptoo Kirui (deceased). I am also of the opinion that the cause of action for adverse possession survives the death of the deceased and can be brought by his

personal representatives. The reason why the 1st Plaintiff brought the suit in the name of the estate was to probably bring in the fact that the deceased bought the suit land before he died and their claim of possession is anchored on this agreement. In any event they can claim for adverse possession in their own right without the bringing a claim on behalf of the Estate of the late Jonathan Kiptoo Kirui (deceased). In any event the 2nd Plaintiff is the son and a beneficiary of the estate of the late Jonathan Kiptoo Kirui (deceased). The 2nd Plaintiff does not have letters of administration but his claim for adverse possession can be determined independent of the estate of the deceased.

I am not persuaded by the defence's claim that the Deceased having filed a caution against the suit land has lost whatever time that accrued on his behalf and time could only run afresh from the date of caution. To the contrary this can only be said to affirm that the possession of the land was adverse to the rights of the registered owner and was an attempt by the deceased to protect his possession without the concurrence of the registered owner.

In the instant case the occupation of the land was pursuant to a sale agreement entered between the Defendant and the late Jonathan Kiptoo Kirui (deceased). In the case of **WAMBUGU VS. NJUGUNA CIVIL APPEAL NO. 10 OF 1982**, the Court of Appeal held that "*where a claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted them.*"

In the same case the court determined that to acquire land which has a known owner by statute of limitation as in the instant case "*the owner must have lost his right by either being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment if the soil for purposes for which he intended to use it.the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued with 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*"

The sale herein was entered into on **18.2.1973** when the property was not registered. The property was registered in 1974. The Defendant testified that he changed his mind to sale the suit property 1 year after the sale. This also brings us to the year 1974. For purposes of determining when the time started running for purposes of adverse possession I make determination that the occupation become adverse and without the consent of the owner (the Defendant) in 1974. Under section 30 of the RLA cap. 300 (repealed) the rights subsisting before registration are in the nature of overriding interests.

I am persuaded from the evidence submitted that the Plaintiffs were in continuous uninterrupted possession afterwards and the only attempt by the Defendant was the filing of the CMCC No. 808 of 2000 where he got eviction orders against one of the sons of the deceased. It is not in dispute that the orders were not enforced and hence no interruption of possession occurred. In any case, the suit was only against one member of the family who is deceased now.

The Defendant submitted that the filing of the case was tantamount to asserting his ownership rights. This can not be denied however as per the authority in the case of **Githu VS. Ndete Civil Appeal No. 24 of 1979 [1984] KLR** where the court held that time will stop running after the owner takes legal proceedings or effectively enters the suit premises. However at the time this case was filed it was over 20 years since the period of limitation started running as above and stoppage of time will not be of any benefit to the Defendant.

I therefore make determination that the Plaintiffs were persons in whose favour time could run. The Defendant had been dispossessed for a period exceeding 12 years. On a balance of probability I am satisfied that the Plaintiff have established their claim against the Defendant. I enter judgment for the Plaintiffs against the Defendant in the following terms of prayers 1, 2, 3 and 6 of the Originating Summons dated 21st June 2004 with costs.

Dated AND SIGNED at Nairobi ON this 24th day of august 2012.

M.K. Ibrahim
Judge

DATED AND Delivered At Eldoret on This 10th Day Of October 2012.

f. azangalala

JUDGE

In the Presence of: Mr. Miyienda for the plaintiff and Mr. Nameti h/b for Mr. Mokuu for the defendant.