



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC CASE NO. 732 OF 2012**

**(FORMERLY CIVIL SUIT NO. 113 OF 2011 (O.S))**

**EMILY MAINA.....1<sup>ST</sup> APPLICANT**

**JEPKURGAT MAINA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ELIUD K. KITUR.....RESPONDENT**

**JUDGEMENT**

1. By an originating summons dated 4<sup>th</sup> July 2011 brought under the provisions of **Order 37 Rule 7 (1) (2) & (3) of the Civil Procedure Rules**, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants sought determination of the following questions;

- a. *Whether or not the Applicants have been in occupation, possession and use of 1 acre of land parcel No. Nandi/Kokwet/559.*
- b. *Whether or not the said possession, use and occupation have been peaceful, open and adverse to the Applicants and uninterrupted from 1968. (sic)*
- c. *Whether rights of the Respondent to the said parcel of land have been extinguished by lapse of time.*
- d. *Whether the Applicants should be declared the owners of the said parcel of land.*
- e. *Who should pay the cost of this proceedings. (sic)*
- f. *Who should be served with the summons in this matter.*
- g. *Whether the Respondent holds the 1 acre of Nandi/Kokwet/559 in trust for the Applicants.*

2. The said originating summons was supported by an affidavit sworn by Emily Maina sworn on 4<sup>th</sup> July 2011 who swore it on her own behalf and on behalf of the 2<sup>nd</sup> Applicant, Jepkurgat Maina. It was stated in the said affidavit that the Applicants had been in possession of 0.9 acres out of *Title No. Nandi/Kokwet/559* since 1968. It was further stated that they had exercised all the rights of ownership over the said portion of land without interruption by the Respondent who was the current registered owner.

3. It would appear that the Respondent did not enter an appearance and neither did he file a response to the originating summons despite service. Consequently, when the suit was set down for hearing on 31<sup>st</sup> October 2018, the Applicants are the only ones who tendered evidence.

4. At the hearing hereof, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants testified personally and called one more witness. It was the Applicants' case that their late husband one Maina, had purchased 0.9 acres out of *Title No. Nandi/Kokwet/559* (hereinafter called the *suit property*) from the previous owner, Jelagat Tapletgoi around 1970. They took possession of the said portion, cultivated it and settled thereon. They also planted trees and fodder grass for feeding their animals. They later on came to learn that the entire land was registered in the name of the Respondent.

5. Although the Applicants framed a total of seven (7) issues for determination, the real issues in controversy are about three or so. In the opinion of the court, the following issues arise for determination;

- a. *Whether the Applicants have demonstrated their claim for adverse possession with respect to 0.9 acres out of the suit property.*

b. Whether the Applicants are entitled to the reliefs sought.

c. Who shall bear the costs of the suit.

6. The legal requirements for proving adverse possession were restated in the cases of **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

7. In the case of **Kasuve Vs Mwaani Investments Ltd**, (supra) the requirements of adverse possession were summarized as follows;

**“...and in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for part of the land...”**

8. The court has considered the evidence on record on the 1<sup>st</sup> issue. There is uncontroverted evidence on record that the Applicants have been in possession of a portion of the suit property since the 1970s. There is unchallenged evidence that they have been cultivating and utilizing the land in question over the years. They have erected residential houses thereon where they reside.

9. It was not suggested that the Applicants' occupation was forcible, secretive or that it was with the consent of the registered owner. The court is satisfied that the Applicants have demonstrated all the elements of adverse possession as required by law.

10. The 2<sup>nd</sup> issue relates to the remedies sought by the Applicants. The court is satisfied that the Respondent's title to the portion of 0.9 acres in occupation by the Applicants has become extinguished by operation of law. The court is also satisfied that the Applicants are entitled to a declaration that they have become entitled to be registered as proprietors of 0.9 acres of the suit property on account of adverse possession. The court therefore finds, and holds, that the Applicants are entitled to the reliefs sought in the originating summons.

11. The 3<sup>rd</sup> and final issue relates to costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. Accordingly, a successful litigant will normally be awarded costs of a suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court notes that the Respondent did not file a response to the originating summons and neither did he attend court for trial. The court is of the view that each party should bear his own costs.

12. The upshot of the foregoing is that the court finds merit in the Applicants' originating summons dated 4<sup>th</sup> July 2011. Accordingly, the court makes the following orders in favour of the Applicants;

a. It is hereby declared that the Respondent's title to a portion of 0.9 acres out of *Title No. Nandi/Kokwet/559* has become extinguished by operation of law under the **Limitation of Actions Act (Cap 22)**.

b. It is hereby declared that the Applicants have become entitled to be registered and shall be registered as proprietors of a portion of 0.9 acres out of *Title No. Nandi/Kokwet/559* on account of adverse possession under **section 38 of the Limitation of Actions Act (Cap 22)**.

c. The Deputy Registrar of the court shall sign and execute all necessary forms, documents and papers on behalf of the Respondent in order to facilitate registration of the Applicants as proprietors of 0.9 acres out of the suit property.

d. Each party shall bear his own costs.

13. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at ELDORET this 24<sup>th</sup> day of JANUARY, 2019.**

In the presence of the Mr. Mwinamo holding brief for Mr. Songok for the Plaintiffs

Defendant - Absent

Court clerk - Emmanuel

**Y.M. ANGIMA**

**JUDGE**

**24.01.19**