



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC CASE NO. 111 OF 2013

{FORMERLY HCC 178 OF 2012 (O.S)}

IN THE MATTER OF ESTATE OF KIMINING ARAP KIBUIGUT (DECEASED)

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

CHRISTIAN WAFULA OMUSOLO.....1ST APPLICANT

GEORGINA ARONI ORODING.....2ND APPLICANT

ESTHER NJERI MWANGI.....3RD APPLICANT

VERSUS

PAULINE JEROTICH.....1ST RESPONDENT

JOSEPH KIPROP MAIYO.....2ND RESPONDENT

JUDGEMENT

1. By an originating summons dated 15th August 2012 brought under **Order 37 Rules 1, 3, 6 and 7 of the Civil Procedure Rules, sections 27 and 38 of the Limitation of Actions Act (Cap 22) and section 71 of the Law of Succession Act (Cap 160)**, the Applicants sought determination of the following nine (9) questions;

- a. Whether one Kimining Arap Kibuigut (now deceased) was the original owner of parcel No. Uasin Gishu/Kimumu Settlement Scheme/plot No. 107 measuring approximately 3.2 hectares (8 acres) the suit property).*
- b. Whether Pauline Jerotich and Josephat Kiprop Maiyo (The Respondents herein) petitioned for grant of letters of administration intestate of the estate of Kimining Arap Kibuigut in High Court of Kenya Succession Cause No. 204 of 2011 Eldoret, and have been issued with the said grant.*
- c. Whether Pauline Jerotich and Josephat Kiprom Maiyo (the Respondents herein) subsequently filed summons for confirmation of the grant in HC Succession cause No. 204 of 2011 Eldoret and have been issued with certification (sic) of confirmation of grant.*
- d. Whether or not Pauline Jerotich and Josephat Kiprop Maiyo (the Respondents) disclosed in the petition for grant of letters of administration intestate that the Applicants herein have interests in the suit property as purchasers or by adverse possession.*
- e. Whether or not the Applicants herein acquired legal interest in the suit property by way of purchase or adverse possession and the extent of that interest.*
- f. Whether or not this court ought to approve the sale, purchase or other transaction between the deceased and Applicants herein relating to the suit property.*
- g. Whether or not the suit property should be registered in the names of the Applicants and Respondents to the extent of their respective shares upon subdivision and the certificate of confirmation of grant issued on 2nd July 2012 in High Court Succession Cause No. 204 of 2011 Eldoret be amended accordingly.*

h. Whether or not the Respondents herein should facilitate the transfer of the Applicants' shares in the suit property to the said Applicants.

i. Whether or not the Respondents should be condemned to pay the costs of this suit.

2. The said originating summons was supported by an affidavit sworn jointly by Christian Wafula Omusolo and Georgina Aroni Orodging on 15th August 2012. It was stated that the Applicants had bought various portions out of Plot No. 107 Kimumu Settlement Scheme from the original owner, one Kimining Arap Kibuigut for valuable consideration on diverse dates between 1989 and 2000. It was further stated that the said vendor had since died and that the Respondents had taken out letters of administration in *Eldoret High Court Succession Cause No. 204 of 2011* in which the Applicants' interest in the said property were not taken into account. It was alleged that the Respondents had concealed the Applicants' interest from the succession court.

3. Although the Respondents were represented in the suit, there is no indication on record that they ever filed a response to the originating summons dated 15th August 2012. The record indicates that their previous advocates, Ms Nyekwei & Co advocates, ceased acting for them for lack of instructions whereas their current advocates, Ms Komen Kipchirchir & Co advocates, did not attend court when the suit was set down for hearing on 7th December 2018.

4. When the suit was set down for hearing, evidence was tendered by the 1st and 3rd Applicants on behalf of the Applicants. The 1st Applicant testified on his own behalf and on behalf of the 2nd Applicant who is his spouse. The evidence of the Applicants was not challenged at the trial since the Respondents did not attend court on the material date.

5. The court has noted that the Applicants framed numerous issues in their originating summons some of which fall within the jurisdiction of the succession court under the **Law of Succession Act (Cap 160)**. The court shall therefore confine itself to matters and issues falling within the ambit of the Environment and Land Court under the **Limitation of Actions Act (Cap 22)**. The matter relating to alleged non-disclosure or concealment of material facts in *Eldoret High Court Succession Cause No. 204 of 2011* can only be canvassed and determined by that court.

6. The court is of the opinion that the following 3 issues are the only issues which legitimately fall for determination by this court;

- a. Whether or not the Applicants have demonstrated their claim for adverse possession as required by law.
- b. Whether the Applicants are entitled to the reliefs sought, or any one of them.
- c. Who shall bear the costs of the suit.

7. 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.**

8. In the case of **Kasuve Vs Mwaani Investments** (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 Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

9. On the basis of the evidence on record, there is no dispute that the Applicants purchased the suit properties from the previous owner (now deceased) or his legal representatives on diverse dates between 1989 and 2000. There is no dispute that the Applicants took possession of the various portions they had purchased. There was no suggestion that their entry was violent or secretive. There was no suggestion that their occupation had been interrupted in the legal sense.

10. There is, however, one legal hurdle which the Applicants must overcome. They must demonstrate that they have been in exclusive possession or occupation for the statutory minimum period of at least twelve (12) years. This period must be reckoned from the date the suit property was first registered. In order for time to start running for purposes of the **Limitation of Actions Act**, the land in question must be registered in the name of someone other than the Applicant.

11. Since time cannot start running in respect of unregistered land, the Applicants must demonstrate the date of registration. In fact, the provisions of **Order 37 Rule 7 of the Civil Procedure Rules** require that an application under **section 38 of the Limitation of Actions Act** be supported by an affidavit to which a certified copy of the title has been annexed. The court has noted that the originating summons dated 15th August 2012 was not accompanied by a certified copy of the title or the land register. In the opinion of the court, however, such omission is not necessarily fatal to a claim for adverse possession. The court may still accord an applicant an opportunity to file it in the course of the proceedings.

12. When the suit was heard on 7th December 2018, the court directed the Applicants' advocates to file certified copies of the land register for the parcels of land in question together with the submissions. The court has noted that although the submissions were filed on 20th December 2018, no certified copy of the land register or extract of title was filed therewith. What was annexed was a copy of a letter dated 7th December 2018 to the Land Registrar requesting for a copy of the land register.

13. The court has examined a copy of the certificate of official search for *Title No. Uasin Gishu/Kimumu/107* and noted that it does not give the entire history of the parcel. It simply indicates that the Respondents were registered as proprietors on 29th March 2016 and issued with a title deed. If the date of first registration is taken to be 2016 then the property was unregistered in 2012 when the instant originating summons was filed. That is the most likely position because when the Respondents petitioned for a grant in 2011 they appeared to have used a letter dated 11th July 2011 from the District Land Adjudication and Settlement Officer, Uasin Gishu which simply indicated that Plot No. 107 in Kimumu Settlement Scheme was “documented” to the late Kimining Arap Kibuigut. There was no indication that it was registered. That is probably why the letter originated from that office and not the Land Registrar’s Office.

14. The court, therefore, finds and holds that the Applicants have failed to demonstrate the element of adverse possession relating to occupation for at least twelve (12) years from the date of registration of the suit property. Time for purposes of adverse possession cannot start running unless and until the land in question has a registered owner. See **Wilson Kazungu Katana & 101 Others Vs Salim Abdallah Bakswein & Another [2015] eKLR**. The first issue is, therefore, answered in the negative.

15. The 2nd issue is whether or not the Applicants are entitled to the reliefs sought in the originating summons. It would follow that since the Applicants have failed to prove the elements of adverse possession, then the Applicants are not entitled to the reliefs sought on account of adverse possession. The 2nd issue is, therefore, answered in the negative as well.

16. The 3rd and final issue is on 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)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has considered that the Respondents did not file any response to the originating summons and neither did they participate at the trial hereof. The court is of the opinion that the appropriate order to make is for parties to bear their own costs.

17. The upshot of the foregoing is that the court finds and holds that the Applicants have failed to prove their claim for adverse possession. The court finds no merit in the originating summons dated 15th August 2012 and the same is consequently dismissed. Parties shall bear their own costs.

18. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at ELDORET this 24TH day of JANUARY, 2019.

In the absence of the Applicants and the Respondents

Court clerk Emmanuel

Y.M. ANGIMA

JUDGE

24.01.19