REPUBLIC OF KENYA

IN THE ENVRIONMENT AND LAND COURT AT KERICHO

CIVIL CASE NO.23 OF 2012

WILLIAM KEPTERER KIRUI.....PLAINTIFF

VERSUS

ROSELINE CHEPKEMOI RUTO.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit against the Defendant seeking an order of permanent injunction to restrain the Defendant by herself, her agents, servants, employees or any other party through whom they may be claiming from interfering with, trespassing on, sub-dividing, selling, transferring, assigning, fencing, erecting structures thereon and/or doing any other act which is prejudicial to the Plaintiff's proprietary interest in L.R No. KERICHO/KIPCHIMCHIM/930 upon a proper survey and a correct boundary being ascertained. The Plaintiff's claim is that the Defendant has trespassed onto her land and caused to be excised therefrom a portion of land thereby denying the Plaintiff the use and occupation of the said portion.

2. The Defendant filed a Defence denying the Plaintiff's claim. She states that the Plaintiff's claim is essentially a boundary dispute which had been settled by Ainamoi Land Disputes Tribunal as confirmed by a decree of the court issued on 7.11.2011. She further contends that having occupied the disputed portion for a period of more than 12 years without any interruption, she has acquired ownership thereof by adverse possession.

3. The suit was set down for hearing and the Plaintiff testified and called one witness while the Defendant did not call any witness.

Plaintiff's case

4. The Plaintiff testified that he is the registered proprietor of land parcel No. KERICHO/KIPCHIMCHIM/930 having purchased it from one Philomena Cheboen in 2011. He produced the title deed in respect thereof as Plaintiff's exhibit 1. He stated that he discovered that the Defendant had encroached on a portion of his land when wanted to fence it and the acreage was not adding up. He subsequently reported the matter to the chief and later filed suit. Upon cross-examination he stated that he did not know the size of the portion that the Defendant had encroached on. He further stated that there was no tea on the land at the time he bought it.

5. Geoffrey Kibowen, the District Surveyor Kericho who testified as PW2 stated that he had visited the suit land and after taking the measurements on the ground and comparing with the Registry Index Map, he found that the Defendant who was the registered owner of land parcel no KERICHO/KIPCHIMCHIM 1489 had encroached on the Plaintiff's land by 0.0584 hectares. He produced a report of the site visit as Plaintiff's exhibit 3. He stated that the disputed portion had tea bushes on it and there were mature trees along the fence. Upon cross-examination he stated that the disputed portion measuring 0.0584 hectares had been fenced by the Defendant as the fence thereon was an extension of the one on the Defendant's land.

Defendant's case

6. The Defendant testified that she was the owner of land parcel number KERICHO/KIPCHIMCHIM/1489 which borders the Plaintiff's land. She stated that she bought her parcel of land in 1969 before the land adjudication process. It was her testimony that during the adjudication process, a portion of her land was left out of her title. She raised the issue with Philomena Chebeon Buisenei who was the first registered owner of land parcel number KERICHO/KIPCHIMCHIM/930 and when they could not resolve the dispute between themselves she filed a case at Ainamoi Land Disputes Tribunal as Land Dispute Claim No.133 of 2011. The Tribunal's verdict was that the boundary was to remain as it was. The decision of the Tribunal was adopted as a judgment of the court and a decree was issued on 7.11.2011. When she took the decree to the Land office for implementation, she discovered that Philomena had transferred land parcel no KERICHO/KIPCHIMCHIM/930 to the Plaintiff on 3.8.2011 while the case at the Tribunal was still pending. She produced a copy of the green card to prove when the transfer was made.

7. She testified that the tea on the disputed portion was hers as she bought the land in 1969 when it had a tea plantation on it. She produced receipts from Tegat Tea Factory to show that she has been plucking the said tea over the years. She stated that she had been in occupation of the disputed portion of land since 1969 and she ought to be declared as the owner thereof by adverse possession. She said that she agreed with what was captured in the Surveyor's report. She acknowledged that on paper the land is registered in the Plaintiff's name but she stated that the situation on the ground was different. She insisted that she had not encroached on the Plaintiff's land.

8. After the close of the Defendant's case, counsel for both parties filed their submissions which I have considered.

Issues for determination

9. From the pleadings, evidence and counsel's submissions, the following issues fall for determination:

a) Whether this court has the jurisdiction to hear this suit

b) Whether the Defendant has encroached on a portion of the Plaintiff's land measuring 0.0584 hectares

c) Whether the Defendant is entitled to the disputed portion of land comprised in L.R No. KERICHO/KIPCHIMCHIM/1489 by adverse possession

d) Whether the Plaintiff is entitled to an order of permanent injunction to restrain the Defendant from interfering with the plaintiff's proprietary interest in L.R no KERICHO/KIPCHIMCHIM/930.

10. Although the Defendant denied the court's jurisdiction in her Defence, her counsel conceded in his submissions that indeed this court has jurisdiction. Without belabouring the point, I agree with the Plaintiff's counsel's submission that the said jurisdiction is conferred by Article 162 (2) (d) of the Constitution and Section 13 of the Environment and Land Court Act, provides as follows: -

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) ……

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs. [Act No. 12 of 2012, Sch.]

11. It is therefore clear that the Environment and Land Court has jurisdiction to hear and determine cases relating to boundaries save that such cases shall first be referred to the Registrar for determination of the boundaries in accordance with section 18 (2) of the Land Registration Act. Regarding the case at the Land Disputes Tribunal between the Defendant and Philomena Cheboen who was the former owner of land parcel no. KERICHO/KIPCHIMCHIM/930, I agree with Counsel for the Plaintiff that the Tribunal had no jurisdiction to determine the case under the repealed Land Disputes Tribunal Act. This is because the dispute concerned the ownership of registered land. But even assuming that it was a valid judgment, it was not capable of being implemented as the property had changed hands by the time it was delivered.

12. The second issue for determination is whether the Defendant has encroached on the Plaintiff's parcel of land measuring 0.0584 hectares. The report produced by PW2, the District Surveyor, Kericho confirmed that the Defendant has encroached on the Plaintiff's land. What is not clear is when this encroachment happened. The Plaintiff only discovered it when he wanted to fence his land and took a surveyor to the ground in 2011. The Defendant maintains that she has been in occupation of the disputed portion since 1969. What is clear is that a portion of the Plaintiff's land measuring 0.0584 hectares was erroneously included in the Defendant's land and she has been in occupation of the said parcel of land for almost 50 years.

13. The third issue for determination is whether the Defendant is entitled to the disputed portion of land by adverse possession.

14. The Defendant claims that she has been in occupation of the disputed portion of land since 1969. The evidence on record is that she has fenced the said portion together with her land and there are mature trees on the fence. She testified that there were tea bushes on the said portion of land at the time she bought it in 1969. Her explanation is that this is a section of her land that was erroneously included in the Plaintiff's title at the time of land adjudication. Philomena Cheboen who was the previous owner of land parcel no. 930 and who might have shed some light on the Defendant's claim was not called as a witness. The inference I draw from this is that her evidence would not have favoured the Defendant.

15. In the alternative, the Plaintiff claims that by virtue of the fact that she has been in occupation of the disputed portion for a period spanning almost 50 years, she ought to be declared the owner thereof by adverse possession.

16. **Black's Law Dictionary, Ninth Edition** at page 62 defines adverse possession as ***"the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious".*** Section 7 of the Limitation of Actions Act sets the statutory threshold of be 12 years for such enjoyment and/or occupation by a claimant to give rise to adverse possession.

17. The requirements for adverse possession in the Kenyan situation have been set out in various judicial decisions. In **Mbira V. Gachuhi (2002) 1 EALR 137**, the court held as follows:

> ***"… a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption …."***

18. Likewise, in **Jandu v Kirplal and Another (1975) EA 225** it was held as follows:

> ***"….to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open, and notorious."***

19. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

> *"From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two,* **Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184** *and* **Wanje v saikwa (2)** *(supra). In the first decision, the court was emphatic that 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 twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.*
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> *What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the*

owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:

"…it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted…"

20. In the instant case the Defendant has not met all the conditions for adverse possession. It is not in dispute that the Defendant has been in open, non-consensual, notorious, exclusive and uninterrupted possession of the disputed portion for a period in excess of 12 years. The Plaintiff's contention is that the Defendant's occupation of his land is wrongful as the land is registered in his name. This appears to be a historical problem that dates back to the time of adjudication. However, the limitation period has been running against the previous registered proprietor of the land and not the Plaintiff. This is because the Plaintiff only acquired the title to the disputed portion in 2011 while this suit was filed in 2012. In the case of ***Peter Gichuki Wanjohi V Julia Mumbi Muturi (2017) eKLR*** *the court cited the case of* ***Francis Gitonga Macharia V Muiruri Waithaka Civil Appeal No 110 of 1997*** *where the Court of Appeal stated as follows:*

"This court has stated that the limitation period for purposes of adverse possession only starts running after the registration of the land in the name of the Respondent. It follows that in the instant case time for adverse possession could not run against the Respondent prior to 1978 as he had no proprietary interest in the property. Time for adversity cannot run against a person who has no interest in the property."

21. I agree with the above authority and similarly in the instant case, time could not run against the Plaintiff before 2011 as he was not registered as the proprietor of the suit land. It is therefore my finding that the Defendant is not entitled to the disputed portion of land by adverse possession

22. The fourth and last issue for determination is if the Plaintiff is entitled to the reliefs sought. In his Plaint the Plaintiff seeks an order of permanent injunction to restrain the defendant by herself, agents, servants, employees or any other party through whom they may be claiming from interfering with, trespassing on, sub-dividing, selling, transferring, assigning, fencing, erecting structures thereon and/or doing any other act which is prejudicial to the Plaintiff's proprietary interest in L.R No. KERICHO/KIPCHIMCHIM/930 upon a proper survey and a correct boundary being ascertained. He also prays for costs and any other relief that the court may deem fit to grant.

23. However, in his submissions, counsel for the Plaintiff argues that the Plaintiff is entitled to damages for loss and damages occasioned by the Defendant's alleged trespass or encroachment on the Plaintiff's land. I find the prayer for damages problematic first of all because it was not pleaded in the plaint and secondly because the suit herein is strictly speaking not one of trespass. I believe the Defendant's version only to the extent that the error occurred at the time of adjudication though it took long to be discovered. The proper remedy in the circumstances is a declaration that the Plaintiff is entitled to the disputed portion and rectification of the register if necessary, as an injunction alone, though warranted, would be inadequate. Even though I agree with the Defendant's counsel that parties are bound by their pleadings, by dint of Article 159 (2) (d) of the Constitution, and the overriding objective of the Civil Procedure Act, the court is enjoined to administer substantive justice. I believe that a declaratory order and rectification is what would logically follow after ascertaining the boundary between the Plaintiff's and Defendant's parcels of land. I therefore invoke the powers conferred on this court by section 80(1) of the Land Registration Act and direct that the register in respect of land parcel No. KERICHO/KIPCHIMCHIM/1489 be rectified to reflect the correct acreage as per the Registry Index Map. In arriving at this decision I am guided by the case of **Odd Jobs v. Mubia 1970 EA 476** where the court held as follows:

" A court may base its decision on an unpleaded issue if it appears from the course followed at the trial, that the issue has been left to the court for decision."

24. I have anxiously and carefully considered the pleadings, evidence submissions and the law and come to the conclusion that the Plaintiff has proved his case on a balance of probabilities. Accordingly, I enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby issued that Plaintiff is the lawful proprietor of 0.0584 hectares erroneously included in the Defendant's land parcel L.R.No.KERICHO/KIPCHIMCHI/1489 but which forms part of L.R.No. KERICHO/KIPCHIMCHIM/930.

b) The register in respect of land parcels number KERICHO/KIPCHIMCHIM/1489 be rectified to reflect the correct acreage, if need be.

c) The Land Registrar, Kericho shall amend the said title to reflect correct acreage within 180 days, if need be.

d) An injunction is hereby issued restraining the Defendant by herself her agents, employees or any other party through whom they may be claiming from interfering with, trespassing or selling, sub-dividing, transferring, assigning, fencing erecting structures thereon and/or doing any other act which prejudicial to the Plaintiff's proprietary interest in L.R.No. KERICHO/KIPCHIMCHIM/930.

e) Given the peculiar circumstances of this case which arose out of an error that cannot be attributed to the Defendant, each party shall bear their own costs.

Dated signed and delivered at Kericho this 28th day of February, 2019.

…….....

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Orina for the Plaintiff

2. Mr. Akinyi for the Defendant

3. Court assistant – Rotich