



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 817 OF 2012

[Formerly Eldoret Hccc No. 30 of 2012]

ABMA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

SARAH TUMNO.....DEFENDANT

JUDGMENT

Abma Investments Ltd (hereinafter referred to as plaintiff) have come to court against **Sara Tumno (hereinafter referred to as the defendant)** stating that the plaintiff on or about 28th January, 1998 purchased land namely Uasin Gishu/Burnt Forest/47 (hereinafter referred to as "suit property") all measuring 39.0 Ha from one Aaron Kimosop Kandie and subsequently, all procedures duly observed, procured a title deed thereto given on the 19th April, 1999.

The plaintiff claims that at the time of the sale of the suit property, one Joseph Kipkurui Tumno, the Caretaker then of the suit property, resided on part-portion of the suit property with his children among them is the defendant herein and that upon the purchase of the suit property, the Vendor, Aaron Kimosop Kandie voluntarily sought alternative land for Joseph Kipkurui Tumno and his entire family and whereas clause seven (7) of the land sale agreement dated 28th day of January, 1998 granted vacant possession of the suit property. It was their mutual agreement that since the defendant had school going children, it was only fair that the children be allowed to complete the academic year and seek alternative schools in Londiani.

The defendant has since neglected, failed and/or refused to vacate the suit property initially in the pretext that she was sourcing for schools for her children and later pronouncing herself the caretaker of the suit property without appointment and/or proper contract by the plaintiff.

That in respect to the foregoing, the defendant has illegally and without any colour of right trespassed into the suit property, therefore denying the plaintiff quiet enjoyment thereof;

The particulars of acts of trespass are thus ***Illegally tilling the planting part-portion of the suit property. Illegally putting up temporary structures on the suit property without the consent of the plaintiff. Illegal occupation of the suit property. Felling and selling grown trees without the consent of the plaintiff. Demarcating and fencing off part-portion of the suit property.***

That despite the fact that the defendant is well aware of purchase of the suit property by the plaintiff and subsequently, the registered owner thereof, the defendant has deliberately and continuously remained adamant in not vacating the suit property and that despite demand and notice to institute legal proceedings against the defendant, the defendant has refused, neglected and/or failed to vacate the suit property.

That there is no other suit and/or legal proceedings pending between the plaintiff and the defendant in respect to the subject matter in this court or any other court.

The plaintiff prays for judgment in terms of:

- (a) A permanent injunction be issued against the defendant, her servants, agents and/or assigns in respect to the suit property.**
- (b) Eviction orders be issued against the defendant.**
- (c) An award for mesne profits be pronounced by this Honourable Court.**
- (d) A government assessor be ordered to assess damage in respect to Clause 7(d) above and subsequently the defendant be**

condemned to pay damages.

(e) Costs of this suit.

(f) Interest in (c), (d) and € above at court rates till payment in full.

(g) Any other or further relief this Honourable court may deem fit and just to grant.

The defendant on her part states that she is in lawful occupation of one-acre portion of the suit property and denies having been served with any lawful demand to vacate the suit property.

She denies the allegation that the plaintiff purchased the property from Aaron Kimosop Kandie on the 28.1.1998. The defendant states that she has been in lawful occupation of a portion of land measuring 1 acre of the suit property prior to 28.1.1998, she denies having trespassed on the land and states that the plaintiff's title is questionable.

In the reply to defence, the plaintiff reiterated contents of the plaint and reiterated that the defendant was in illegal occupation of the land.

When the matter came for hearing, the plaintiff Mary Kiptanui stated that she lives in Nairobi and works in Nairobi. That she works for the plaintiff, Abma Investments Ltd. She bought land in Burnt Forest, Burnt Forest/Uasin Gishu/47. The owner was the late Aaron Kandie. They went to look at the suit property and they liked it. She started to buy in 1998. In 1999, they had finished buying it and were given the title. Mr. Aaron Kandie told them that there was a relative called Joseph Tomno. The plaintiff wanted to take vacant possession. Kandie agreed to give the relative another parcel of land. They were told by Aaron Kandie to give them time to look for land for the relatives. Joseph Tomno requested them to allow the defendant on the land as they had school going children.

However, the defendant refused to leave the land. The chief tried without success. They then tried and failed. The District Officer tried and failed. They asked the Land Board to allow them to subdivide and that the Land Board allowed them to subdivide.

In 2004, they obtained new titles. It became Uasin Gishu Burnt Forest/218. The other subdivided plots have their title deeds. The defendant claims ownership in Uasin Gishu Burnt Forest/218. They bought the land from the late Aaron Kandie. She has the agreement dated 28.1.1998. The Plaintiff is not aware of Kshs. 30,000 owed to Kandie. She prays for judgment thus eviction of the defendant from the land. She prays for mesne profits and damages plus costs and interest.

The defendant on her part stated that her ID. No. is 8029698. That she lives in Burnt Forest. That she has her statement dated 24.5.2013 and the court should look at the statement. She does not live on the land but plants maize on the suitland which measures one acre. She has stayed in the land for more than 40 years. She entered in the year 1978. She lives there until now. She prays that the court recognizes her rights.

The plaintiff submits that she is the registered proprietor of the suit property and therefore the absolute owner of the suit property and should enjoy all rights and privileges belonging or appurtenant thereto. She relies on the provisions of sections 24,25, and 26 of the Land Registration Act no 3 of 2012. She submits that she is entitled to mesne profits and damages and have quantified the same at ksh 100,000 per year from the year 1999.

The defendant on her part submits that the plaintiffs claim is time barred based on the provisions of the Limitation of Actions Act Cap 22 laws of Kenya. She claims to have acquired the land by adverse possession.

(b) ISSUES FOR DETERMINATION

Your Lordship,

The issues for determination on the part of the plaintiff are;

(1) Whether the plaintiff has proved ownership of the suit property.

(2) Whether the plaintiff is entitled to enjoy the rights of a registered proprietor of land 3) Whether the plaintiff is entitled to damages/mesne profits.

(3) Whether the defendant has obtained rights in the suit property by virtue of adverse possession.

(1) Whether the plaintiff has proved ownership of the suit property

The plaintiff produced various documentary exhibits to demonstrate that it is the lawful proprietor of the suit property. The sale agreement shows that the plaintiff purchased the suit property known as UASIN GISHU/BURNT FOREST/47 on 28th January, 1998 at a consideration of Kenya Shillings Seven Million (Kshs. 7,000,000/-).

The plaintiff also produced an original title deed for the suit property which clearly shows that the plaintiff is the registered proprietor of the suit property. The title deed was acquired regularly with no iota of fraud. This evidence was not controverted by the defendant. Section 26 of the Land Registration Act, No. 3 of 2012 states as follows;

"The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except-

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

There being no evidence of fraud, illegality or corruption on the part of the plaintiff adduced by the defendant, this court finds that the plaintiff has proved ownership of the suit property to the standards required by law.

(2) Whether the plaintiff is entitled to enjoy the rights of a registered proprietor of land.

The plaintiff has demonstrated to this court that it is the registered proprietor of the suit property. The plaintiff is however not able to utilize the suit property as the defendant is in occupation of the suit land illegally. Section 24 of the Land Registration Act, No. 3 of 2012 states as follows;

"Subject to this Act-

- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appertaining thereto;

Section 25 of the Land Registration Act, No. 3 of 2012 also provides for the rights of a proprietor of land. It states as follows;

"25(1) the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..."

(3) Whether the Plaintiff is entitled to Damages/Mesne Profits

The plaintiff purchased the suit property and its name entered in the certificate of title issued by the Land Registrar on 19th April, 1999. The defendant has hitherto been cultivating crops, rearing livestock on the suit land and making huge profits from the sale of crops, trees, natural stone and livestock. The defendant has for all this time been depriving the plaintiff from utilizing its parcel of land and the plaintiff is therefore entitled to damages and or mesne profits.

Section 2 of the Civil Procedure Act, Cap 21 Laws of Kenya defines mesne profits as follows;

"Mesne profits- in relation to property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interests on such profits, but does not include profits due to improvements made by the person in wrongful possession."

Order 21 Rule 13 of the Civil Procedure Rules, 2010 provides as follows;

"13. (1) where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the courts may pass a decree-

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until
 - (i) the delivery of possession to the decree-holder
 - (ii) The relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
 - (iii) The expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c) a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry."

The Court of Appeal in the case of *Attorney General —vs- Halal Meat Products Limited [2016] eKLR* stated as follows;-

"It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another."

WHETHER THE DEFENDANT HAS OBTAINED RIGHTS IN THE SUIT PROPERTY BY VIRTUE OF ADVERSE POSSESSION.

It is indisputable fact that when the plaintiff purchased the suit land, the defendant was in occupation of the one acre. The defendant had been in occupation of the land for more than 13 years when the plaintiff came to court and more than 12 years before the plaintiff purchased the suit property. It is not proved that Aaron Kandie gave the defendant permission to settle on the land. The defendant claims that they paid Aaron Kandie KShs.30,00. This is denied by the plaintiff but not controverted by Aron Kandie. There is no agreement between the plaintiff and the defendant allowing the defendant to live on the ground.

The law on adverse possession is clearly given in section 7 of the Limitation of Actions Act Cap 22 laws of Kenya. Thus

“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.”

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

I have considered the evidence on record and rival submissions and do find that the plaintiff's claim is statute barred having been brought more than 12 years after she obtained title. In fact, there is a likelihood that the defendants had obtained adverse rights against the title of Aaron Kandie.

I do dismiss the plaintiff's suit with costs for being time barred. The defendant has been in exclusive use of the land without the permission of the plaintiffs. The occupation has been open, hostile, uninterrupted against both Aron Kandie and the plaintiff. The suit is dismissed with costs.

Dated and delivered at Eldoret this 12th day of April, 2019.

A. OMBWAYO

JUDGE