



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 7 OF 2017**

**JENNIFER KOBILO KANDIE.....PLAINTIFF**

**VERSUS**

**JAMES ONDIEK.....DEFENDANT**

**JUDGMENT**

By a plaint dated 13<sup>th</sup> January 2017 the plaintiff herein sued the defendant seeking for the following orders:

- a) THAT this Honourable court to issue an order for a permanent injunction restraining the defendants his agents or servants , by themselves or others from occupying, encroaching, constructing, alienating, laying claim or otherwise interfering with the plaintiff's parcel of land known as ELDORET/MUNICIPALITY BLOCK WEST FARMERS)1712.
- b) Any other or further relief this court could deem fit and just to grant.
- c) Costs of this suit.

The defendant filed his defence and a counterclaim dated 21<sup>st</sup> February 2017 and filed on 23<sup>rd</sup> February 2017, seeking for orders that:

- a) The plaintiff's suit be dismissed with costs and judgment be entered for the defendant for;
- b) A declaration that the said parcel No. ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS) 1712 belongs to the defendant and the defendant is entitled to be registered as such and a title be issued to the defendant.
- c) An order of injunction permanently restricting the plaintiff from interfering with the defendant quiet possession of the defendant's parcel of land No. ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS) 1712
- d) Costs of this suit

**PLAINTIFF'S CASE**

The plaintiff gave evidence and stated that she is the registered owner of all that parcel of land known as ELDORET/MUNICIPALITY BLOCK 15 (WEST FARMERS) 1712 measuring 0.0120 Hectares having been registered as absolute owner on 23<sup>rd</sup> October 2014. She stated that she was issued with an allotment letter together with a share certificate and a title deed to the suit land.

PW1 further stated that the defendant encroached on her parcel of land in 2016 without her consent. She therefore urged the court to enter judgment as prayed in the plaint together with costs of the suit.

On cross examination by Mr. Magare, PW1 confirmed that she had filed a complaint with the District Land Registrar and that the complaint was that her husband had given out land without her consent further that she does not know when the subdivision was done. The plaintiff also confirmed that by the time she got the title in 2014 the defendant was on the suit land.

PW2 Christostom Kipserem Maiyo who is the plaintiff's husband testified and stated that he was a Chief between 1984 and 2005. He also stated that the land belonged to the plaintiff and that it was never sold to the defendant.

On cross examination he stated that he did not know how the defendant got into the suit land. He also confirmed that they do not stay on the suit land and that the plaintiff has never used the land since 1991. The plaintiff therefore closed her case.

## **DEFENCE CASE**

The defendant gave evidence and stated that he bought the suit land from the plaintiff's

husband Chrysostom Kipserem Maiyo in the year 1998 but the same could not be transferred to his name due to the fact that the title was still in the name of West Farmers Company Limited.

The defendant further stated that the plaintiff's husband, Chrysostom Kipserem Maiyo was not a member of West Farmers Company Limited but was allotted the said parcel by virtue of being the area chief ex gratia and the said plot no. 572 which was allotted was renamed to ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS) 1712.

It was further DW1's evidence that he has lived on the suit parcel land from 1998, to date a period of over 20 years and that during the 2007/2008 post-election violence, the plaintiff caused the defendant's house to be burnt down in the pretext of post-election violence which was ethnically motivated.

DWI testified that he had built two houses and a store for his two wives which were burnt down. He produced photographs of the burnt houses as exhibits before the court. He further testified that the houses he is currently residing in were built for him by the Government of Kenya through the Ministry of Special programs. He produced photographs of the houses together with the list of West Farmers post-election violence victims bearing his name.

DW1 also produced electricity bill and water bill and statement in his name in respect of the suit land and a letter that PW2 Chief Maiyo wrote to help him with water and electricity connection which letter was signed by both the plaintiff and PW2. It was further the defendant's evidence that he had paid Chief Maiyo the plaintiff's husband and the plaintiff Kshs. 100,000/- and the sale agreement was signed by both the plaintiff and her husband Chief Maiyo and witnessed by Mwai Muteti. It was his evidence that the said agreement was destroyed during the clashes, as it was burnt when his houses were burnt during the post-election violence.

On cross-examination DWI testified that he has always known the plaintiff as the chief's wife who sold him land in 1999. He testified that he had paid Kshs.35,000/-, Kshs. 15,000/-, Kshs. 15,000/-, Kshs. 10,000/-, Kshs. 10,000/-, Kshs.3,000/- and Kshs. 12,000/- for the title and paid according to how they agreed on the payment.

DW2 Selina Cheserem village elder Kipkenyo testified that she has known the defendant since 1999. She stated that she did not know the plaintiff and that she has a record and knows that the people who stay in Kipkenyo area since 1998. She stated that she knows people when they apply for electricity and water.

DW3 Patrick Mushiri Mungai testified that he was the chairman of the internally displaced persons IDPs West Farmers. He testified that as the chairperson they took inventory of homes that were burnt and through support of the government through the Ministry of Special programs built houses for people whose houses had been burnt as a result of post-election violence. He produced IDP list exhibit no.2 being the list of people who were affected and were built for houses. The defendant's name is captured on the list. He testified that they built the defendant two houses to replace his two houses which were burnt.

DW3 further on cross-examination testified that he has known the defendant since 2002 and that they vetted the victims before building for them houses. It was his evidence that at the time they were constructing no one came claiming that the defendant's land belonged to them. He stated that they rebuilt the houses that had been burnt down. That the plaintiff and her husband did not lay a claim to the suit land.

DW4 Mwai Muteti testified that he is an assistant to the village elder. He stays in West Farmers. It was his evidence that the plaintiff came to him in 2006 inquiring about the prices of lands in the area. He testified that she inquired about Plot no. 1712 and he told her the plot had been bought by the defendant. He testified that he had known the defendant since 1990's when he came with a lorry Bedford which he repaired for him. It was his evidence that the defendant indicated to him that he was relocating to plot no. 1712, He stated that the defendant showed him the sale agreement between himself and chief Maiyo PW2 for the sale of the suit plot no. 1712. It was further DW4's evidence that the plaintiff indicated that she wanted to sell plot no. 1712.

On cross-examination he confirmed that the plaintiff showed him the title deed but he told her that the land belonged to Senior Chief Maiyo. He also testified that he knew the plaintiff as the wife of the senior chief whom he identified in court and that he had signed the agreement.

DW5 Antony Mboya testified that he stayed in the suit land as a squatter tilling and cultivating until 1998 when chief Maiyo removed him. He stated that PW2 the plaintiff's husband came to the land with the defendant whom he introduced as a new owner of the land. Further that the defendant contracted him to dig a borehole in the suit land also dug a trench connecting the water line from the neighboring plot to the suit land.

The defendant closed his case.

## **PLAINTIFF'S SUBMISSION**

The plaintiff filed her submissions and reiterated her evidence and submitted that she obtained a legal title over the suit parcel of land upon following due legal process. She further submitted that she is the absolute and indefeasible owner under section 26 of the Land Registration Act No. 3 of 2012 and that title can only be challenged on grounds of fraud, misrepresentation, unprocedurally or through corrupt scheme. Under section 23(1) of the repealed Act, Cap 281 Laws of Kenya a certificate of title is conclusive evidence of ownership.

The plaintiff therefore urged the court to allow her claim and dismiss the defendants counterclaim with costs.

### **DEFENDANT'S SUBMISSION**

Counsel submitted that the plaintiff suit is an abuse of the court process as the matter had been settled that the suit land belongs to the defendant. Counsel further submitted that the plaintiff's suit is time barred, by the limitations of actions Act Cap 22 Laws of Kenya which provides under section 5,6,7 and 13.

- i. Where any cause of action in respect of the conversion or wrongful detention of movable property has occurred to any person and before he recovers possession of the property, a further conversion or wrongful detention takes place, no action may be bought in respect of the original conversion or detention.
- ii. Where any such cause of action occurred to any person and the period of limitation prescribed for an action thereon and for an action in respect of such a further conversion or wrongful detention as aforesaid has explained and he was not during that period recovered possession of the movable property. The title of that person to the property is extinguished.

Actions to recover land are subject to the provisions of the limitations of Actions Act Cap 22 Laws of Kenya provides that ' An action may not be bought by any person to renew land after the end of timeline first from the date on which the right of action occurred to him or if it first accrued to some person through to whom he claims, to that person".

Mr. Magare submitted that from the evidence it is clear that the defendant entered the suit land in 1999 and has lived there since then to date without interruption save for the post-election violence. He therefore submitted that the plaintiff's claim to the suit land must fail by operation of the law. Section 13 of the Limitations of Action acts states that:-

"A right of action to recover land does not accrue unless the land is in possession of some person whose favour the period of limitation can run (which possession of some person whose favour the period of limitation run) which possession in this act referred to as adverse possession) and where under section 10,11 and 12 of this act a right of action to recover land accrues on a certain date, a right of action does not accrue unless and until some person takes adverse possession of land"

Section 17 of the limitations of Actions Act provides that Subject to section 18, expiration of the period prescribed by this act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished"

Mr. Magare cited the case of Lawrence Muiruri Njuguna —vs- Charles Mwenga Mulwa

Muranga ELC NO. 45 of 2017 where the court observed that:

*" The Defendant acquired his title on 13/07/1995. It is his pleading that the plaintiff trespassed on to the land upon acquisition of the title and has persisted in his actions (occupation & cultivation) to date. The suit was filed in 2010 and based on the defendant's own pleading by 2010 the plaintiff had been in occupation for 15 years well in excess of 12 years statutory period. It therefore means by the time this case was filed the plaintiff had been in occupation for 21 years.*

*This demonstrates that the defendant had discontinued his occupation of the suit land for over 12 years. Equally it also shows that the plaintiff has by his conduct (open interrupted occupation & utilization of the land) demonstrated the appropriate Animus Possipendi to dispossess the defendant and use the land in a manner that is hostile and contrary to that of the defendant*

*Further in his oral testimony he admitted that the balance of 3 acres is not occupied. The fact of existence of trees on the land is testament of the fact that the plaintiff has been on the land for a longer time than the defendant would want to persuade the court.*

*Having analyzed the evidence, the rival submissions and affidavits and the relevant law, I am persuaded that the plaintiff has proved adverse possession on a balance of probabilities and in accordance with section 37(a) of the Limitations of Actions Act, the plaintiff has acquired title in 4.0 acres in the suit land LOC. 17/1GANJO/20 against any person registered as the proprietor, the defendant included"*

Mr. Magare further submitted that the defendant has been in possession of the suit land since 1999 of which the plaintiff admitted to having not taken possession even though she acquired the title deed in 2014.

Counsel relied on the authority of *Willy Kimutai Kitilit -Vs- Michael Kibet Eldoret Court of Appeal Civil Appeal No. 51 of 2015* on the issue of lack of consent of Land Control Board where the court held;

*"It was not in dispute that the appellant sold a 2acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last installment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstance of the case as we have held in essence that, the lack of the consent of the Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit"*

Counsel therefore urged the court to find that the plaintiff has not proved her case against the defendant and therefore should be dismissed with costs and the defendant's counterclaim be allowed with costs.

### **Analysis determination**

This is a case where the plaintiff wants the court to grant an order for a permanent injunction against the defendant from encroaching on her parcel of land. The plaintiff and her husband PW2 gave evidence in support of her case. She stated that she is the registered owner of the suit land and that she acquired the title in 2014.

From the pleadings, the evidence and submissions of both parties I find that the issues for determination of by the court are as follows:

- a) Whether the plaintiff is the legal owner of the suit land
- b) Whether the plaintiff is entitled to the orders of injunction against the defendant
- c) Whether the defendant bought the suit land from the plaintiff's husband PW2.
- d) Whether the defendant has been in occupation of the suit land for over a period of 12 years.
- e) Whether the plaintiff's suit is time barred by operation of the law.
- f) Whether the defendant is entitled to be registered as an owner of the suit land.

It should be noted that the demeanor of the plaintiff during the hearing was combative. She was ready to wrestle for her suit land.

On the 1<sup>st</sup> issue as to whether the plaintiff is legal owner of the suit land, the plaintiff produced a copy of a title deed to the suit land which she acquired on 23<sup>rd</sup> October 2014. She also produced a search certificate indicating that she was the registered owner of the land.

There was evidence that the suit parcels of land belonged to Eldoret West Farmers Company Limited who allocated to their shareholders of which the plaintiff and her husband PW2 were not members. It is on record that PW2 the plaintiff's husband was a Chief of the area and was given a plot as a gift by the Company of which he sold to the defendant which he confirmed vide a letter dated 4<sup>th</sup> October 2007. He did not deny having written the said letter.

Why was PW2 writing a letter titled "to whom it may concern" that he had given the suit plot to the defendant and should be allowed to connect water and electricity if he had not sold it? This is a case where the plaintiff wants to reap where she did not sow.

The plaintiff did not produce any documents to show that she was a shareholder of the company that allocated the land to the members. She just stated that she had a share certificate which she did not produce in court. She did not produce receipts of payment of the suit land. This is because she did not have them as she was not a member. The best she could have done is to ask the husband who was purportedly given the land to produce evidence of how he got the plot. PW2 also did not have the documents.

PW2 appeared in court and his demeanor was of a witness under siege by the wife who had urged him to come and give evidence on her behalf. He did not have much to add to the case but only to deny that he did not sell the land to the defendant.

Acquisition of a title to land is the end product and the process of acquisition is very important and must be procedural. The plaintiff did not show how she acquired the title to a suit land which had a dispute and where the defendant had been in occupation for many years.

Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

The court is also empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. On the 1<sup>st</sup> issue I find that the plaintiff did not prove that she acquired the title procedurally.

On the 2<sup>nd</sup> issue as to whether the plaintiff is entitled to the orders sought for injunction, having found that the plaintiff did not acquire the title procedurally, it follows that she is not entitled to the orders for injunction. Granting orders of injunction would amount to the eviction of the defendant who has been in occupation of the suit land for more than 19 years.

The plaintiff did not seek for an order of eviction of the defendant but a single prayer of a permanent injunction against the defendant. Supposing the court granted the order as prayed in the plaint, how was she going to deal with the defendant who has been in occupation of the suit land for a period of time, who has developed the suit land?

On the 3<sup>rd</sup> issue as to whether the defendant bought the suit land from the defendant's husband, the defendant's evidence together with his witnesses established that the suit land was sold to him by PW2. The list of owners of plots in Eldoret West Farmers Ltd was produced and the defendant's name was amongst them. The photographs produced indicated the houses that were burnt down and the reconstructed ones.

The letter by PW2 also confirmed that he had sold the land to the defendant. Further the minutes by the elders dated 11<sup>th</sup> January 2017 attended by amongst others PW2 who is a retired Chief and the plaintiff's husband confirmed that the land was given to PW2 as a gift by Eldoret West Farmers limited and that he sold it to the defendant. DW5 gave evidence that he previously cultivated the suit land with the permission of PW2 but later informed him that he had sold the land to the defendant.

On the issue as to whether the defendant has been in occupation of the suit land for more than a period of 12 years, the plaintiff and the witnesses testified that the defendant has been in occupation of the suit land since 1999 and that is why she wanted orders for injunction against the defendant. There was no evidence to disprove the assertion that the defendant had been in occupation of the suit land for that period.

The defence raised the issue that the plaintiff's claim is time barred by operation of the law as she brought the case in 2017 more than 19 years after the defendant took possession of the suit land. A registered owner of land by the provisions of **section 7** of the Limitation of Actions Act may not bring an action-

*“...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 “.*

At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and **section 38** of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. It was evident that the plaintiff took possession of the suit land more than 19 years ago from the time that he bought the land from PW2. The plaintiff woke up in 2017 to claim land after the law had acted against her and extinguished her right to the land.

It is important to also deal with the issue as to whether the defendant can claim land by way of adverse possession in a counterclaim. In the case of **Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015**, where the claim was raised in the defence, the Court in rejecting the objection to the procedure, stated the law as follows;

*“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [ 1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [ 1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”*

I also subscribe to the above position that a defendant can raise the issue of limitation of actions and a claim of adverse possession vide a defence and counterclaim. How else would such a defendant assert his claim? Does he have to wait and file a different claim vide an originating summons which might be challenged as res judicata.

Finally on the issue whether the defendant is entitled to be registered as an owner of the suit land, the evidence adduced by the witnesses together with the documentary evidence establishes that the defendant bought the land from PW2 and that he has been in occupation of the suit land without interruption for a period of over 12 years. The plaintiff acquired the title to the suit land unprocedurally as she was not a member of Eldoret West farmers Limited. The land had been given to her husband as a gift which he had every right to dispose of any manner that he wished of which he chose to sell to the defendant herein.

Having considered the evidence, the submissions of both parties and judicial authorities I find that the plaintiff has failed to prove her case to the required standard and is therefore dismissed with costs to the defendant. I further find that the defendant has proved his counterclaim against the plaintiff and is entitled to be registered as the owner of the suit land.

I therefore make the following orders:

- 1) The plaintiff's suit is hereby dismissed with costs to the defendant
- 2) A declaration is hereby issued that the said parcel No. ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS) 1712 belongs to the defendant and is entitled to be registered as such.
- 3) That the Land Registrar is hereby directed to revoke and cancel parcel No. ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS) 1712 registered in the plaintiff's name and register it in the defendant's name.
- 4) An order of permanent injunction is hereby issued restraining the plaintiff from interfering with the defendant's quiet possession of parcel of land No. ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS) 1712
- 5) The plaintiff to pay costs of the counterclaim

**Dated and delivered at Eldoret on this 9<sup>th</sup> April, 2019**

**M.A. ODENY**

**JUDGE**

**JUDGMENT READ IN OPEN COURT** in the presence of Miss.Jeruto for the Defendant and in the absence of the plaintiff.

Mr. Koech – Court Clerk