



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 12 OF 2015

DAVID K. TANUI.....1ST PLAINTIFF

AFRICAN INLAND CHURCH SOGEON.....2ND PLAINTIFF

VERSUS

JAMES KIGEN KOIKIROK.....1ST DEFENDANT

WILLIAM KIPTUM KOECH.....2ND DEFENDANT

JUDGMENT

By an originating Summons filed in court on 21st January 2015 the plaintiffs sued the defendants herein claiming that they had acquired parcel No. **LEMBUS /SINONIN /324 AND 327** formally known as **LEMBUS/SINONIN/188** by way of adverse possession. The plaintiffs sought for the following orders:

- 1) That the 2nd plaintiff be registered as the sole indefeasible proprietor of the parcel Nos. **LEMBUS /SINONIN /324 AND 327**.
- 2) That the District Land Registrar do enter respectively the name of **AFRICAN INLAND CHURCH SOGEON** as the proprietors of land parcels Whether the plaintiff purchased the parcels Nos. **LEMBUS /SINONIN /324 AND 327** .
- 3) That land title deed No. **LEMBUS /SINONIN /324** issued to the 2nd defendant be hereby revoked and the same be issued to the 2nd plaintiff.
- 4) That the defendants do pay the plaintiff costs of this suit and interest thereon.

The originating summons was supported by the affidavit of DAVID K. TANUI the 1st plaintiff herein.

Plaintiff's Case

The plaintiff adopted his statement as evidence before the court and stated that on 18th May 1996 he bought land parcel **LEMBUS/SINONIN/76** from the 1st Defendant at a consideration of Kshs. 70,000/= of which he paid Kshs.40,000/= leaving a balance of Kshs 30,000/= which he paid to the 1st defendant.

It was his evidence the 1st defendant's brothers later objected to the sale and he therefore asked for a refund of the purchase price. He stated that the 1st defendant was given 21 days to refund the money but he opted to give the plaintiff alternative land of which he wanted additional Kshs. 11,500/ which he was paid and the same was acknowledged making a total of Kshs. 86.200/=

PW1 also stated that land parcel LEMBUS/SINONIN/188 was subdivided as he was entitled to the entire parcel of land but he decided to take only two parcels being 324 and 327 as the 1st defendant had been chased away by his brothers from the land. PW1 further stated that he sold the two portions to the 2nd plaintiff who put up a church and have been on the site since the year 2005.

He stated that sometime in 2014, the 1st defendant sold to the 2nd defendant land parcel no. LEMBUS/SINONIN/324 and that is what triggered this suit. It was further his evidence that he had registered a caution on the suit land but he had changed his address so he did not get the notice for removal of the caution. He later went and lodged another caution. He therefore urged the court to order that the land reverts back to the 2nd plaintiff whom he had sold to.

On cross examination by Counsel for the defendants, PW1 stated that he had paid the balance of the purchase price of which the 1st defendant acknowledged. That he took possession of the suit land in 1998 and subdivided and sold to the 2nd plaintiff who has built a church thereon. He also said that there is no dispute on plot No. 327 but 324 which the 1st defendant has trespassed on. PW 1 therefore urged the court to grant the orders as prayed.

PW 2 gave evidence on behalf of the 2nd plaintiff who is the AIC Church Sogeon. He stated that the church bought plot No. 324 from the 1st plaintiff vide an agreement dated 22nd May 2006 for a consideration of Kshs. 160,000/ for two parcels of land. He further stated that the 1st defendant told him that the 1st plaintiff had not paid Kshs. 11,500/ which they paid to the 1st defendant with the authority of the 1st plaintiff where all of the parties signed an acknowledgment.

PW 2 testified that plot Nos 324 and 327 were as a result of a subdivision of plot No. 188. He stated that they reported the matter to the Chief and police in 2010 when the 1st defendant tried to construct on plot No. 324 but he was stopped. He therefore urged the court to grant the orders as prayed as the church has constructed on the same.

PW 1 was recalled to produce the original documents which had been marked for identification and closed his case.

Defence Case

The defendant adopted the affidavit filed in court as his evidence and denied having sold to the 1st plaintiff the suit plots. It was his evidence that the 1st plaintiff was his doctor whom he owed Ksh. 40,000/. He stated that they had agreed with the 1st plaintiff that he would sell the suit land and refund him the money that he owed him. He further stated that he gave the Church the 2nd plaintiff the suit land to build a church but they did not pay him any money.

It was DW1's evidence that they did not have any written agreement with the church and that he had sold plot No. 324 to the 2nd defendant. He admitted that the 2nd plaintiff has been in occupation since 2006. He therefore urged the court to dismiss the plaintiff's case.

On cross examination he admitted that his claim that he owed the 1st plaintiff money was not sworn in his affidavit filed in court. He also acknowledged that he knew the people who signed the agreement but the church had not paid him any money.

Plaintiffs' Submission

Counsel filed written submission in support of their clients' cases and reiterated the evidence on record. Counsel for the plaintiff submitted that the plaintiffs had proved that they have acquired the suit lands by way of adverse possession and should be declared as such. Counsel took issue with the affidavit that the 1st defendant filed in response to the originating summons whose contents were totally at variance with the evidence that he introduced in court. Counsel stated that the defendant admitted that he is the one who signed the affidavit and was aware of the content, but while giving evidence he introduced an angle of evidence that he owed the 1st plaintiff money for medicines that he had taken on credit worth Kshs. 40,000/.

Mr. Nyamweya, Counsel for the plaintiff submitted that the sale agreement and the mutation forms dated 13th November 2003 that subdivided the plots indicated the plot Nos. as **LEMBUS/SINONIN/324 and 327**. Further that the acknowledgment which was in 2003 was for the same plots. Counsel stated that it is on record from the 2nd plaintiff's evidence who is a pastor that there is a church building on the suit plot which was built in 2006. He therefore urged the court to disregard the 1st defendant's evidence as it was contradictory.

Defendant's Submission

Counsel for the defendant submitted that from the evidence on record it was clear that the plaintiffs have not proved the ingredients of adverse possession. Counsel submitted that the plaintiffs have not proved adverse possession as the land they took possession of was a different parcel of land. That the parcel he bought in 1997 was not the one that he took possession of in 2005.

Counsel submitted that time can only start running from 2005 and not 1997 and that there was no continuous and exclusive possession of the

land. Counsel further submitted that from the evidence it can be deduced that the 1st defendant had exclusive possession of the suit land.

Counsel relied on the case of **Titus Mutuku Kasuve —vs- Mwaani Investment Ltd & Others, Civil Appeal 2004 1KLR 184** quoted in Lawrence **Muiruri Njuguna v Charles Mwenga Mu1wa [2017] eKLR** where the court held that;

. for an order that he be registered a proprietor in place of the registered proprietor and in order to be entitled to the 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 dispossessing the owner or by the discontinuation of possession by the owner on his own volition."

Counsel therefore submitted that there was nothing to show that the 1st defendant left the suit plot in a manner that is adverse to his rights paving way for a third party to defeat his rights by adverse possession. Counsel urged the court to dismiss the plaintiffs' case with costs.

Analysis and determination

This is a case where the plaintiffs want the court to declare that they have acquired land parcel No.s **LEMBUS/SINONIN1/324 and 327** by way of adverse possession. The ingredients that have to be proved in adverse possession are now settled and we need not reinvent the wheel. The court held in the case of Mbira –v- Gachuhi (2002) IEALR 137 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 statutory prescribed period without interruption...."

Further the Court of Appeal also pronounced itself in the case of Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR where it was held that:

"Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years."

For a person to succeed in a claim of adverse possession, he or she must prove the above ingredients. It is not a walk in the park where anybody can claim to be in adverse to someone's right to land without proof that he has been in open, continuous, peaceful and exclusive possession for a statutory period of 12 years.

The evidence on record shows that the 1st plaintiff and the defendant entered into a sale agreement on 18th May 1996 and there is an acknowledgement for the sale of plot No. LEMBUS/SINONIN/ 188. This parcel was later subdivided as per the mutation form dated 4th August 2003 which gave the resultant plot numbers including plot No. 324 and 327 amongst others. There is no evidence from the 1st defendant to rebut the fact that he entered into a sale agreement with the 1st plaintiff and that he signed the acknowledgement of the purchase price from both plaintiffs. He did not allege that it was a forgery as if that was the case he could have filed a case against the two.

Counsel for the defendant submitted that the land that the plaintiff bought was a different one therefore a claim adverse possession is not tenable. In the case of **Githu -vs- Ndeete (1984) eKLR 776** it was held that it did not matter that the suit parcel was subdivided or that the parcel number changed description.

In the current case the subdivision, change of description, and change in proprietorship, did not constitute any interruption of the possession of the land by the plaintiffs. The defendant admitted that the 2nd plaintiff has been in possession since 2006 which is in excess of a period of twelve (12) years, such possession was quiet and uninterrupted. The possession was open for all to see and neither was it forceful, was not in secret and was exclusive in nature without permission of the Defendants.

Further why did he allow the 2nd plaintiff a church to build on land that he had not sold to them? There is no evidence that he donated it as charity. His evidence that the church was to fundraise and pay him money is not plausible. If that was the case then they should have entered into such an agreement.

The 1st defendant's line of evidence that he owed the 1st plaintiff Kshs. 40,000/ was an afterthought as if that was the position then it would have come from the plaintiff himself. Who can refuse being owed money which is supposed to be repaid? This was also not in the replying affidavit that he filed in response to the originating summons. This was a major issue which should have come out clearly as his defence if it was the case. I find that the defendant was not being candid on the transaction that he entered into the sale of land with the plaintiffs. He wants to renege of the terms of the agreement and enrich himself unfairly by receiving the purchase price and also the land which he had sold.

The registration of the 2nd defendant as a proprietor of the suit land where the plaintiffs had taken possession for more than 12years does not affect the rights of one claiming to have acquired the suit parcel of land by adverse possession. In the case of **Francis Mungai Kimani -vs- Ngendo Kibogoro [1988] eKLR** it was held that

"the Defendant on being registered as the proprietor of the land as successor in title to her husband acquired exactly the same rights and liabilities as her husband had held. She could not have acquired rights which were superior to her deceased husband..."

The 2nd defendant having been registered as a proprietor acquired the same rights and liabilities of the 1st defendant and therefore was subject to the rights of the plaintiff who was claiming the land by way of adverse possession. He could not have acquired superior rights than those of the 1st defendant. He did not come to court to claim his rights. There was even no evidence that he had taken possession of the suit land. His remedy if any lies with the 1st defendant who should refund his money if he paid any at all or be given alternative land by the 1st defendant. That is not for this court to determine as it is not before this court.

I therefore find that the 2nd plaintiff has proved that they have been in occupation of the suit parcels for a period of more than twelve (12) years and are therefore entitled to be registered as the proprietor of the suit parcels by way of adverse possession. I therefore make the following orders.

- 1) That the 2nd plaintiff be registered as the sole indefeasible proprietor of the parcel Nos. **LEMBUS /SINONIN /324 AND 327**.
- 2) That the County Land Registrar Baringo do enter the name of **AFRICAN INLAND CHURCH SOGEON** as the proprietor of land parcel No **LEMBUS /SINONIN /324 AND 327**.
- 3) That land title deed No. **LEMBUS /SINONIN /324** issued to the 2nd defendant is hereby revoked and the same be issued to the 2nd plaintiff.
- 4) That the defendants to pay costs of the suit to the plaintiffs.

Dated and delivered at Eldoret on this 8th day of April, 2019.

M.A ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence Mr. Juma holding brief for Mr. Nyamweya for Plaintiff and Miss. Chesu holding brief for Mr. Nyagaka for the Defendant.

Mr. Koech – Court Clerk