



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 764 OF 2012

REBECCA CHEPKOECH LAGAT.....PLAINTIFF

VERSUS

WILLIAM KIBOR LAGAT.....DEFENDANT

JUDGMENT

Rebecca Chepkoech Kipkurui (*hereinafter referred to as the plaintiff*) has come to this court against William Kibor Lagat claiming to have acquired by adverse possession land parcel No. Nandi/Kabiemit/3 measuring 5.0 acres and praying for orders that he be declared entitled by adverse possession to all that piece of land containing 5.0 acres or thereabouts registered in the land registry as land reference number Nandi/Kabiemit/3. He prays for a declaration that the defendant/respondent's proprietorship rights over land parcel namely Nandi/Kabiemit/3 including right to file suit to evict or cause injunction against the plaintiff has been extinguished.

The applicant seeks to be registered as the sole proprietor of the whole parcel having acquired ownership thereof through adverse possession.

The originating summons is grounded on the facts that the plaintiff/applicant's late husband Kipkurui Arap Rop purchased a portion of land on 24th November, 1965 from the late Kipsugut Arap Sikaka. The deceased Kipsugut Arap Sikaka subsequently registered all the portion in his name locking out the applicant's husband Kipkurui Arap Rop from the portion he purchased. That after the demise of her husband, the plaintiff/applicant sought the intervention of the area chief and the district officers in claiming their portion in vain and that when the defendant/respondent applied for grant upon the estate of Kipsugut Arap Sikaka, the plaintiff/applicant launched an objection where the court observed that issues of uninterrupted use of the parcel of land belong in a civil suit either for purchase or due to adverse possession.

The defendant/respondent has further proceeded to obtain confirmation of grant and may now proceed to evict the plaintiff/applicant. The plaintiff/applicant has in the premises become entitled to the suit land by adverse possession. The plaintiff/applicant should in the premises be registered as the proprietor of the suit land in place of the respondent.

In the supporting affidavit, the plaintiff states that her late husband Kipkurui Arap Rop purchased land parcel number Nandi/Kabiemit/3 measuring 5.0 acres from the late Kipsugut Arap Sikaka but the late Kipsugut Arap Sikaka registered the same in his names locking out her late husband as a proprietor. That the defendant/respondent went ahead to obtain letters of administration and grant vide Eldoret Probate and Administration Cause No. 256 of 2005 in relation to the estate of Kipsugut Arap Sikaka locking out her interest in Nandi/Kabiemit/3. The defendant/respondent admitted at the hearing of Eldoret Probate and Administration Cause No. 256 of 2005 that neither himself nor the late Kipsugut Arap Sikaka has occupied the said land.

That the attempt by the provincial administration and the elders to determine the issues surrounding the suit land were inconclusive and the defendant/respondent has not supported the same. It is stated by the plaintiff that the Judge hearing Eldoret Probate & Administration Cause No. 256 of 2005 noted that issues relating to purchaser's interest and/or adverse possession should be handled through a civil suit and that she lived with her late husband together with their children peacefully in the said land since 1965 and neither the registered proprietor nor the respondent did anything to interfere with the said occupation and therefore she is entitled to the orders sought.

In the replying affidavit, William Kibor Lagat states that he was registered on 22.11.2011 pursuant to a certificate of confirmation of grant issued by the High Court on 25.7.2011. The plaintiff had raised a protest to the confirmation of grant but after a full hearing where evidence was taken *viva voce*, the court dismissed the protest and he was subsequently given the land as a beneficiary.

He denies that the plaintiff has acquired rights over the land by way of adverse possession as alleged. He denies that the plaintiff resides or has at any time resided on land parcel number Nandi/Kabiemit/3. He denies having admitted in Eldoret Probate and Administration Cause No. 256 of 2005 that neither him nor the late Kipsugut Arap Sikaka has occupied the land and further denies that the plaintiff, her husband and children have lived peacefully on the said land since 1965. That to the contrary, the plaintiff's son one Simon Kipchirchir Kirui invaded the land in 2002 and put up a temporary structure and was recently joined in by other son Gilbert Kipsang Sabulei who has also put up

another temporary structure.

He states that the said sons of the plaintiff went into the land forcefully and used threat of violence against him when he attempted to stop them from occupying the land. That he had also not obtained the requisite grant of letters of administration to the estate of the late owner Kipsugut Arap Sikaka. The grant was made to him on the 6.3.2006. That at the time of the issuance of the grant which was done by consent, the presiding Judge Justice Mohammed Ibrahim advised that the status quo be maintained until when the issue of distribution of the estate would be determined. He states that the late Kipsugut Sikaka died in 1976 and the land lay fallow and disused as he was still a young child hence he was brought up by his uncles. That there can be no adverse possession against an estate of a deceased person.

That it is also not true that the deceased had sold any part of the land to the plaintiff or her husband as alleged as it emerged during the hearing of the Succession Case No. 256 of 2005 that there was in fact no sale agreement and the purported agreement mentioned was never signed or endorsed by the deceased. The dispute had previously been arbitrated by the area chief and District Officer and on those occasions the plaintiff relied on different alleged agreements of sale. That he wishes to rely on the proceedings and pleadings in Eldoret High Court Succession Cause No. 256 of 2005.

The plaintiff is intent on grabbing land that lawfully belongs to him yet she has her own parcel of land where she has always resided and resides to date being Nandi/Kabiemit/10 belonging to her late husband. That this suit is entirely without merit and ought to be dismissed with costs.

When the matter came up for hearing, the plaintiff **Rebecca Chepkoech Lagat, PW1** testified that she is the widow of the late Kipkurui Arap Rop. That she is a resident of Kipkaren, Turbo Location and the plaintiff in this suit. She does recall very well on 24th November, 1965 when her late husband purchased all that parcel of land known as Nandi/Kabiemit/3 measuring 5.0 acres at a total consideration of Kshs.1,000 from the late Kipsugut Arap Sikaka. It was witnessed by the village elder one Mr. Philip Kiproop Barngetuny, Mr. Kipkemboi Arap Samoei and Mr. Richard Kipkering Bangeny. They occupied the suit land since 1965 to date. In 1976, the late Kipsugut Arap Sikaka passed on and was buried in a public cemetery in Eldoret. Later on, his wife passed on too (Tuiya Tamining) and was buried at her mother's land.

In the year 2005, the respondent one, William Kibor Lagat filed Succession Cause No. 256 of 2005 to be the sole administrator of the estate of the deceased Kipsugut Arap Sikaka. She objected to the proceedings but the defendant was later granted the letters of administration to the said estate.

She is now seeking legal redress in order for the honourable court to ascertain ownership of the parcel of land known as Nandi/Kabiemit/3 and nullify the letters of administration to the respondent plus the title deed be effected in her name.

PW2, Kipkemboi Samoei Barngeny testified that he is a resident of Kabiemit, Kipkaren and a neighbor of the applicant. It is within his knowledge that the suit land known as Nandi/Kabiemit/3 originally belonged to the late Kipsugut Arap Sikaka who later sold it to the late Kipkurui Arap Rop in the year 1965. That the family of the late Kipkurui Arap Rop lived on the said parcel of land to date with no known interruptions. The respondent in 1965 was still a small child and he is not the son of the late Kipsugut Arap Sikaka. They are now seeking redress as to ascertain ownership of this land.

The **defendant, DWI** testified that he is a resident of Kaplemur village in Nandi County. He is the registered owner of the parcel of land number Nandi/Kabiemit/3. He was registered the owner by transmission in November, 2011 after he filed a Succession Cause Number 256 of 2005 to the estate of his father Kipsugut Arap Sikaka at the High Court in Eldoret.

That the plaintiff had filed an objection to the proceedings but her objection was dismissed by the court after hearing witnesses from both sides. He will rely on the proceedings in that succession cause as part of his evidence in this case. That the plaintiff's claim to own the land by adverse possession is without merit and is founded on falsehoods.

First, he knows of his own knowledge that the suit land originally belonged to his father who died around 1976. At the time of his death, he was a young boy and he stayed with his uncles. The deceased never sold any part of land to the plaintiff or any other person. Upon his death, the land remained fallow, unused and unfenced and was a general grazing land for neighbour's cattle.

In 1979, he went to the parcel of the land with an intention of putting up a house. However, the plaintiff emerged and claimed that she had bought the land from the deceased. Elders' *barazas* were convened to deliberate on the issue. Her claim was dismissed by the elders as the agreements she presented were not signed by the deceased and were contradictory.

The land remained fallow as the plaintiff and her family with the aid of the provincial administration then, prevented him from accessing the land. He was a young man with no financial support or means.

In 2002, the plaintiff's son one Simon Kirui went to the suit land and constructed a house. The plaintiff herself had never resided on the land as she resides in her husband's parcel of land number Nandi/Kabiemit/10 not far from suit land.

The plaintiff's son built the house. He reported to the area District Officer who summoned them to his office. Again, the plaintiff came with different agreements which were unsigned and contradictory.

After seeking further advice, he filed Succession Cause Number 84 of 2004 in Kapsabet Court which was later transferred to Eldoret and become Eldoret High Court Succession Cause Number 256 of 2005. In the course of hearing the Succession Cause Number 256 of 2005, the Judge, Mohamed Ibrahim advised him to wait the outcome of succession before attempting to evict the plaintiff's son from land. The Judge directed that status quo be maintained. The proceedings were not concluded until 2011 and he was then registered as the owner after the plaintiff's objection was dismissed.

The plaintiff's son has been on the land since 2002 and his occupation has been by force and threat of violence against him. In 2012, when he required the defendant's son to move from the land, the plaintiff filed the current suit. The plaintiff intended to grab his land and prevent him from inheriting the only asset left to him by his father who died while he was still of tender age.

He states that the plaintiff's case ought to fail as she cannot claim to acquire land belonging to the deceased person, when the owner was deceased and no administrator to the estate had been appointed an administrator. There can be no adverse possession against the property of a deceased person.

He prays the plaintiff's suit be dismissed with costs as it is a gimmick to illegally acquire land that rightfully belongs to him. He is not related to the plaintiff in any way.

DW2, Simon Kipchirchir Rop testified that he is a resident of Kaplemur village in Nandi County. He lives next to land Parcel number Nandi/Kabiemit/3, which is the subject of this suit. He has been resident in the area for about 55 years now since he was born and raised there.

He knows the history of the suit land well. The land belonged to the defendant's father one Kipsugut Arap Sikaka, hereinafter referred to as the deceased. He knows of his knowledge that the deceased died in 1976. At the time of death, he left a disused grass thatched house on the parcel of land. The land remained unoccupied after the death of the deceased. There was no fence around the land and it was generally open to all neighbours as a grazing field.

The plaintiff is also a neighbour living in parcel number Nandi/Kabiemit/10. She has never at any time resided on the suit land. He recalls in 1979, the defendant went to the suit land with an intention of constructing a house but the plaintiff prevented him on allegations that she had bought the land. It was then that in 1980 he attended chief's *baraza* where the dispute was deliberated on. The plaintiff came to the *baraza* with several agreements which were unsigned and were contradictory. Her claim was therefore found to be not genuine.

The land remained unoccupied until 2002 when the plaintiff's son one Simon Kirui entered the parcel and constructed a house which is on the land to date.

The defendant has always claimed the land but the plaintiff, her sons, and family have prevented him by use of violence and threat of violence from accessing the land. He knows that over time there have been several cases before the elders and chief between the plaintiff's family and defendant over the parcel land.

I have considered the evidence on record and the submissions by counsel and do find that the plaintiff's evidence in chief and on cross examination was that when she was married in 1970, she lived in the suit parcel of land. They took possession of the land at the time of marriage as the third wife. The second wife passed on. She lived with the second wife on the suit parcel of land but each wife had her own house. She stayed in the parcel with the children until they grew adults. When they became adults, she left them in the parcel of land and moved to parcel number Nandi/Kabiemit/10. Her children constructed on parcel number Nandi/Kabiemit/3. The defendant has never tried to till the land. PW2, neighbor of the plaintiff on cross examination states that he was present when the plaintiff's husband bought the land and that the family has been utilizing the land since the 1970s.

The defendant and the witness on the other hand state that the plaintiffs have been using force to occupy the land. When the agreement was made between the plaintiff's husband and Kipsugut Arap Sikaka, Kipsugut Arap Sikaka had no children hence the defendant could not be his son but nephew being son to Kiplagat Arap Sugut. The defendant was unreliable as he appeared to lie to the court that his father was Kipsugut Arap Sikaka. It was only after intense cross examination that he admitted that the deceased Kipsugut Arap Sikaka was not his father.

DW2 on cross examination agrees that the land is occupied by the son of the plaintiff since 2002. They have constructed 2 houses. The land is fenced. He admits that the defendant is not a biological child of Kipsugut Arap Sikaka.

The law on adverse possession in Kenya stems from section 7 of the Limitation of Actions Act. 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.”

In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] Eklr the court of appeal held that

“The acquisition of land under the doctrine of adverse possession is therefore recognized in all the civil and common law jurisdictions. The concept and elements of adverse possession are almost the same. However, there is no clear pattern as regards the length of limitation periods. The period after which the real owner may no longer bring an action to repossess her land varies from 10 years to 30 years. Proof of good faith on the part of the possessor of the land will significantly reduce the limitation period in some jurisdictions such as France, Spain, The Netherlands and Poland. For instance, French law permits the acquisition of title to land by prescription over a 30-year period if the possession is continuous, uninterrupted, peaceful, public and unequivocal. A reduced prescription period of ten years is provided if the possessor had acted in good faith and in genuine belief of the existence of a just title. However, if the true owner does not live within the district of the Court of Appeal, then the period is extended by twice the number of years i.e. 20 years. In some countries e.g. Hungary, Germany, Massachusetts US, the evidence of good faith is not a relevant consideration. The application of the doctrine of adverse possession as well as the duration of possession also depends on whether the land is registered or not. “

Moreover, that,

“As it can readily be seen most countries do maintain the doctrine of adverse possession and courts continue to recognize the public policy value of extinguishing title to registered property after a certain period. Limitation of actions mechanisms such as adverse possession plays an important role in the enforcement of one of the fundamental legal principles of the judicial system, which is that at some point, litigation must come to an end. It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce.”

Although the elements of an adverse possession action are different in every jurisdiction, a person claiming adverse possession is usually required to prove non-permissive use of the property that is actual, open and notorious, exclusive, adverse and continuous for the statutory period.

This court finds that the plaintiff has established that Mr. Kipsugut Arap Sikaka died in the year 1976. By the time of his death, the plaintiff's husband had taken possession of the deceased's land and that the family has been in possession to date. when the plaintiff was married in 1970, she lived in the suit parcel of land. She took possession of the land at the time of marriage as the third wife. She lived with the second wife on the suit parcel of land but each wife had her own house. The plaintiff has established that all family members have been in non-permissive use of the property and have been in **actual, open, notorious, exclusive and continuous** possession of the suit land.

The right of adverse possession accrued 12 years after the plaintiff had entered the land with the husband and continued against the estate of the deceased and therefore, when the defendant obtained title to the deceased land by transmission, the right of adverse possession had accrued and change of ownership did not vitiate this right. I do find the plaintiff has proved his case on a balance of probabilities and do order as follows:

- i. The plaintiff be declared entitled by adverse possession to all that piece of land measuring 5.0 acres or thereabouts registered in the land registry as land reference number Nandi/Kabiemit/3.
- ii. The defendant/respondent's proprietorship rights over land parcel namely Nandi/Kabiemit/3 including right to file suit to evict or cause injunction against the plaintiff has been extinguished.
- iii. The plaintiff be registered as the sole proprietor of the whole parcel having acquired ownership thereof through adverse possession.

Costs of the suit to the plaintiff. Orders accordingly.

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

A. OMBWAYO

JUDGE