



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 84 OF 2017

JOHN K. CHEPKWONY.....PLAINTIFF

VERSUS

MATHEW KOECH (Sued as the Administrator of the estate of

Kipkoech Arap Chepkwony- Deceased).....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit by way of Originating Summons dated 18th July 2017 seeking the following reliefs:

- a) *A declaration that the deceased was holding one acre in L.R No. KERICHO/CHEMOIBEN/269 in trust for the Plaintiff.*
- b) *That there be an order terminating the trust.*
- c) *That there be an order directing the Defendant to sign documents of sub-division and transfer of one acre comprised in L.R No. KERICHO/CHEMOIBEN/269 in favour of the Plaintiff herein and in default an authorized officer of the court to do so on behalf of the Defendant.*
- d) *The costs of this suit be provided for.*

2. The Originating summons was supported by the Plaintiff's affidavit sworn on the 18th July 2018 in which he depones that he purchased the suit property from the Defendant's late father one Kipkoech Arap Chepkwony pursuant to a sale agreement dated 9th October 1983. After he paid the purchase price in full, the deceased put him in possession of the suit property after which he fenced it, planted tea bushes and other trees thereon. He further depones that the deceased applied for consent of the Land Control Board. He also executed mutation forms which were used to sub-divide the suit land into two portions of land. The deceased subsequently executed transfer forms transferring the Plaintiff's portion to him but when he presented them to the Lands office for registration of the title to the Plaintiff's name he was told to surrender the original title to the suit property. Unfortunately, the said title was lost and before a provisional one could be issued, the deceased passed away.

3. The Plaintiff avers that in 2014, the Defendant applied for letters of administration in respect of his late father's estate vide Kericho HCC Succession Cause No. 95 of 2014 without disclosing the Plaintiff's interest as a purchaser. The plaintiff therefore maintains that the Defendant is holding the suit property in trust for him.

4. Despite being served with the Originating Summons, the Defendant did not file any Replying affidavit nor did he attend court for the hearing. The suit therefore proceeded ex-parte.

5. Plaintiff testified in accordance with his Supporting affidavit. He produced a copy of the sale agreement, application for consent of the Land Control Board, mutation forms and a copy of the Transfer form as exhibits. He also produced a copy of a certificate of official search dated 18th March 2019 which indicates that the suit property is still registered in the name of the deceased. That marked the close of the Plaintiff's case after which counsel for the Plaintiff filed his submissions.

Issues for determination:

6. From the Originating Summons, evidence and counsel's submissions, the following issues emerge for determination:

- i. Whether the Plaintiff purchased the suit property from the late Kipkoech arap Chepkwony
- ii. Whether the Plaintiff was in possession of the suit property for more than 12 years
- iii. Whether the defendant terminated the said possession
- iv. Whether the Defendant holds the suit property in trust for the Plaintiff

Analysis and Determination

7. The first issue for determination is whether the Plaintiff purchased the suit property from the late Kipkoech arap Chepkoech. It was the Plaintiff's uncontroverted evidence that he purchased a portion of land measuring one acre comprised in land parcel number KERICHO/CHEMOIBEN/269 from the deceased at a price of KShs. 10,000. He produced a sale agreement dated 9th October 1983.

8. With regard to the second and third issues, the Plaintiff testified that after he purchased the suit property, the deceased put him in possession thereof and he fenced the land and planted tea bushes and other trees. He was in quiet, peaceful and continuous occupation of the suit property for a period of 22 years from 1983 until 2005 when the plaintiff chased him away after the plaintiff's father died.

9. By the time the Plaintiff filed this suit he had been out of occupation for a period of slightly less than 12 years. In view of this, he cannot claim the suit by way of adverse possession as his claim would not be tenable. This is in line with the principle set down in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR** where the court held as follows:

“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 adversal 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...”

10. The last issue for determination is whether the Defendant holds the suit property in trust for the Plaintiff. It is not in doubt that it is the deceased who put the Plaintiff in possession of the suit property after receiving the full purchase price with the intention of transferring it to him. The deceased took the necessary steps to effect the transfer but hit a snag because he had lost the original title deed. It was unconscionable for the Defendant to throw the Plaintiff out of the suit property in the manner he did. I am of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable in this case and the Defendant cannot renege on the agreement between his late father and the Plaintiff as their intentions were very clear.

11. In the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR** the Court of Appeal stated as follows:

*“Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated in **Steadman v Steadman 1976 AC 536 at 540:***

“ If one party to an agreement stands by and lets the other party incur expenses or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement was not valid...This court is enjoined to dispense substantive justice. What is justice, justice is conscience, not a personal conscience but the conscience of humanity. Would the conscience of humanity allow an individual to receive the purchase price and later plead that the agreement is void? The conscience of humanity dictates that a constructive trust and proprietary estoppel shall apply in such cases”

12. In line with equitable principles and the letter and spirit of the 2010 Constitution which enjoins this court to administer substantive justice, it is my finding that there is a constructive trust between the Plaintiff and the Defendant. The Defendant therefore holds the suit property in trust for the Plaintiff and the Defendant ought to transfer the same to him.

13. The upshot is that I find and hold that the Plaintiff has proved his case on a balance of probabilities and I make the following final orders:

- a) A declaration is hereby issued that the deceased was holding one acre in L.R No. KERICHO/CHEMOIBEN/269 in trust for the Plaintiff.
- b) The said trust is hereby terminated.

c) The Defendant shall sign documents of sub-division and transfer of one acre comprised in L.R No. KERICHO/CHEMOIBEN/269 in favour of the Plaintiff herein and in default, the Executive officer of the court to do so on behalf of the Defendant.

d) The costs of this suit shall be borne by the Defendant.

Dated, signed and delivered at Kericho this 30th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Caleb Koech for Mr. Migiro for the Plaintiff
2. No appearance for the Defendant
3. Court Assistant - Rotich