

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 383 OF 2016

BENJAMIN KIPKORIR CHESIRE.....APPLICANT

VERSUS

KIPCHIRCHIR CHUMBA.....RESPONDENT

RULING

Kipchirchir Kipchumba, (hereinafter referred to as the defendant) filed an application on 16th May, 2018 seeking orders that the originating summons dated 19th December, 2016 be struck out with costs. The application is based on the grounds that the defendant is the registered owner of the suit land, PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)63. Further, that the claim for adverse possession is prematurely instituted and the suit discloses no cause of action. In the supporting affidavit, the defendant states that he was registered as the proprietor of the suit property on 4th April, 2016 and that the proceedings were instituted on 13th December, 2016. And therefore, the right of adverse possession cannot run against him.

The gravamen of the Defendant's submission is that he is the registered owner of the suit land and acquired registration of the suit property on 4th April 2016. The applicant instituted proceedings on 13th December, 2016. The suit herein is premature and incompetent. Under paragraphs 7, 8 and 9 of the replying affidavit the respondent does not recognize the respondent/applicant's title that defeats the claim of adverse possession.

He further submits the plaintiff has never been in occupation of the suit parcel and it was Kiplagat Kotut who was in possession of the same by virtue of the sale agreement dated 31st January, 2000 which agreement was nullified in Eldoret ELC No. 691 of 2012. The respondent has therefore never been in continuous and uninterrupted possession of the suit land.

The plaintiff filed an affidavit whose gist is that the land was registered on 20th January, 1989 and it became private property on 21st January, 1991. It was registered in the name of John Kaguru Ngugi who later transferred it to Rose Jebok Kipngok on 23rd December, 1991. Rose held the land up to 4th April, 2016 when it was transferred to the current registered owner. By the time the defendant became the registered owner of the land 25 years had passed since it had become private property.

The plaintiff moved into the suit property in 2002 and by the time the land was transferred to the defendant he had been in continuous and exclusive possession of the entire parcel of land for more than 14 years. The plaintiff had acquired the land through adverse possession by the time it was transferred into the defendant's name.

The suit is based on a claim for adverse possession. The court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** 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 an action against such person in assertion of his title for a certain period, in Kenya 12 years.”

In **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR** the court held;

12. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

13. This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

It is therefore clear that in order for the claim to disclose a cause of action, the plaintiff must have been in possession of the land for a period of 12 years. The applicant claims that the suit was registered in the name of Rose Jebok Kipngok on 23rd December, 1991 who held the land until 4th April, 2016 when it was transferred to the current registered owner. The plaintiff moved into the land in 2002 therefore it follows that there is an issue for determination as to whether he had apparently occupied the land for 14 years before the transfer to the current owner.

The plaintiff has disclosed a cause of action that can only be determined in the main suit and therefore the application is not merited and is dismissed with costs.

Dated and delivered at Eldoret this 29th day of May, 2019.

A. OMBWAYO

JUDGE