



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 94 OF 2009 (O.S)

IN THE MATTER OF L.R KERICHO CHESINENDE/446, 447,448,449 /450 (ORIGINALLY KERICHO/ CHESINENDE/133

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

CAP 22 LAWS OF KENYA

KIGEN KANDIE.....PLAINTIFF

VERSUS

RUTH CHEMUREN.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff who is the administrator of the estate of the late Rhoda Chelangat Kandie instituted this suit by way of Originating Summons dated 26th November 2009 for recovery of five Plots measuring 0.046 hectares each. The said Originating Summons was amended on 8th April 2016. In the Amended Originating Summons the Applicant seeks the following orders:

- 1. That the Plaintiff has acquired title to the said commercial plots measuring 0.046 hectares each by adverse possession.*
- 2. That a declaratory order of ownership be issued in favour of the applicant for 5 plot to be excised from Title No. KERICHO KIPKELION/CHESINENDE/133.*
- 3. That leave be granted to extend time for obtaining Land Control Board consent in respect of sub-division and transfer of 5 plots to be excised from Title No. KERICHO KIPKELION/CHESINENDE/133.*
- 4. That the Respondent be ordered to sign necessary documents to effect a valid transfer of the land in favour of the Applicant and in default the Executive officer of this Honourable Court to do so.*
- 5. That the costs of this suit be provided by the Defendant.*

2. The Amended Originating Summons was supported by the Further affidavit of Kigen Kandie, the Applicant herein sworn on the 7th April 2016. It was opposed through the Replying Affidavit of Ruth Chemuren sworn on the 21st August 2016.

3. The suit was canvassed by way of viva voce evidence. The Applicant testified and called three witnesses while the Defendant testified and called two witnesses.

Plaintiff's Case

4. The Plaintiff who testified as PW1 stated that he is was one of the administrators of the estate of his late mother Rhodah Kandie. He relied on his witness statement dated 13th June 2012. In the said statement he stated that his late mother entered into an agreement with the late Cheruiyot Chemuren for the sale of five commercial plots measuring 50 ft by 100 ft being part of land parcel no. KERICHO/KIPKELION/CHESINENDE/133 at a price of Kshs.800,000. He produced a copy of the sale agreement dated 17th January, 1996 as an exhibit. It was his testimony that his late mother took possession of the plots and fenced them though no consent of the Land Control Board was obtained to enable the transfer of the said plots in favour of his mother. A dispute later arose regarding the actual location of the plots and on 6th January 2006 the said Cheruiyot Chemuren and the Plaintiff entered into a mutual agreement to reaffirm the plots and confirm that the vendor was pursuing the sub-division of the said plots. He stated that the plots were meant for the construction of a filling

station. He said that his late mother placed a caution over land parcel no. KERICHO/KIPKELION/CHESINENDE/133 before she died.

5. Upon cross-examination he confirmed that the initial agreement was for 5 commercial plots measuring 50 ft by 100ft, not a filling station. He admitted that the plots earmarked for a filling station did not add up to 5 plots. He explained that the second agreement provided that in case the plots earmarked for the filling station did not add up to 5, the plaintiff was to be given another plot behind the proposed filling station and in return they would assist Mr. Chemuren to develop the plots that were directly behind the proposed filling station. Put to task why they promised to do this, he stated that it was a gratuitous offer as Mr. Chemuren was elderly and he requested for their assistance. He denied that the plots marked numbers 15 to 19 which were upon sub-division given the numbers 446-450 were the ones sold to his mother. He admitted that he had no document showing that a caution had been placed over the plots that were earmarked for a filling station. He denied that they coerced Mr. Chemuren to sign the second agreement in 2009.

6. Richard Kiplangat Sinei who testified as PW2 stated that he was present when the second agreement was signed between Kigen Kandie and Mr. Chemuren accompanied the surveyor when he went to the site to identify the plots and fix beacons. He contradicted the Plaintiff's evidence by stating the plots marked 446-450 were the ones earmarked for the filling station yet the plaintiff stated that the plots earmarked for the filling station were less than five. He denied that the Plaintiff wanted to defraud Chemuren's family of the plots.

7. Upon cross-examination, he admitted that the first sale agreement dated 1.7.96 did not specify that the plots were meant for a filling station even though he stated that the map that was used during the negotiations had the plots meant for the filling station clearly marked as such. He stated that during the fencing of the plot after it had been damaged, policemen were engaged to oversee the exercise.

8. Moses Lilan who is a Deputy County Commissioner Kamkunji testified as PW3. He testified that he was present when Kigen Kandie and Mr. Chemuren signed the agreement on 6.1.2009. He said that prior to the signing of the said agreement, he had held a number of meetings with the parties to try and resolve the dispute regarding the plots. He stated that he was aware that Mr Chemuren had been arrested in connection with the plots although he was unable to elaborate. He stated that Mr. Chemuren was bitter about the way he had been treated by the family of Kandie and he had wanted to rescind the sale but he eventually signed the agreement.

9. Edward Odhiambo Onditi a Private Land Surveyor who testified as PW4 stated that he was instructed by Rhoda Kandie to survey the plots that she had bought at Chesinende Settlement Scheme. He stated that he used a map which had the petrol station clearly delineated on it. He stated that the plots had since been sub-divided and given new numbers. He stated that the acreage of the plots meant for the filling station was equivalent to 5 plots. This is at variance with the evidence of PW1 which was to the effect that the plots earmarked for the filling station did not add up to 5 plots.

Defendant's Case

10. The Defendant Ruth Chemuren testified that she was present when her late husband sold 5 plots to the late Rhoda Kandie. She stated that Rhoda was shown the plots which were between other plots that they had sold and she was emphatic that the said plots were not next to the highway. She stated that her late husband did not sell the plot that was earmarked for a filling station. She stated that about six months after she had bought the plots, Rhoda started insisting that she wanted the plots for purposes of constructing a petrol station. Mr. Chemuren told her that she was being inconsistent and according to her he told her "don't buy a white cow today then tomorrow you insist you wanted a black cow" She said that Rhoda never made any formal complaint regarding the plots though she had Mr. Chemuren arrested and locked by the police. She stated that Rhoda later placed cautions over plot numbers 446-450. She stated that she had no objection to transferring the 5 plots registered as KERICHO/CHESINENDE/446,447,448,449 and 450 to the Plaintiff.

11. Upon cross-examination she stated that the Plaintiff fenced the plots earmarked for the petrol station under police supervision instead of fencing the 5 plots that Mr. Chemuren had sold to them. She stated that the plots next to the highway had already been sold to other people who had developed them. The plot meant for the petrol station is however still vacant. She stated that she was not privy to the agreement dated 17th January, 1996 between her late husband and the late Rhoda Kandie although he had told her that he signed it under duress after being harassed by the police.

12. Bernard Kipngeno Yegon who testified as DW2 stated that he visited the suit property at the request of the defendant. He stated that plots numbers 446-450 are on the second row from the main road while plot number 452 is on the front row along the Kericho-Nakuru Kipkelion junction. He produced a report of the report he prepared after the site visit as Defence Exhibit 1.

13. Upon cross-examination he stated that he used the Registry Index map to identify the plots. He stated that the 5 plots were curved out of land parcel number Kericho/Chesinende/Kipkelion/133. He clarified that the 5 plots measure 50ft by 100ft each while plot no. 452 which was earmarked for the filling station is equivalent to 3 plots measuring 50ft by 100ft each. He faulted the document that was used to partition the plots and apply for change of user from agricultural to commercial use as it was not endorsed by the Ministry of Lands. He explained the process of sub-division of land and confirmed that the 5 plots that were sold to Rhoda Kandie are indicated in the Registry Index map as parcel number 446-450.

14. Wilson Rono Busienei, a village elder at Chesinende testified as DW3. It was his testimony that the late Chemuren showed him the plots he had sold to Rhoda Kandie. He said the plots were in the second row from the main road. He later learnt that there was a dispute between the plaintiff regarding the said plots. While he was at the chief's office he witnessed PW2 request for Administration Police to go and supervise the fencing of the plots. He stated that when Mr. Chemuren went to the chief's office in January 2009 to sign the second agreement with the plaintiff, he was very sick. With that evidence the Defendant closed her case after which counsel for both parties filed their submissions.

Issues for determination

15. Having considered the pleadings, evidence and the submissions, the following issues fall for determination:

- i. Which plots did the Plaintiff's late mother purchase from the late Cheruiyot Arap Chemuren?
- ii. Did the Plaintiff take possession of the 5 plots that they purchased?
- iii. Is the sale agreement between the Plaintiff and the late Cheruiyot Chemuren still valid and enforceable?
- iv. Is the Plaintiff entitled to the plots he took possession of by virtue of adverse possession?
- v. Is the Plaintiff entitled to the reliefs sought?
- vi. Who should bear the costs of this suit?

Analysis and Determination

16. The first issue for determination is which plots the Plaintiff's late mother purchased from Cheruiyot Arap Chemuren.

17. It is not in dispute that in both the agreement dated 17th July 1996 and the one dated 6.1.2009, the Plaintiff bought 5 plots measuring 50ft by 100ft from the late Cheruiyot Chemuren. The main bone of contention is the location of the said plots. While the Plaintiff argues that his late mother bought 5 commercial plots earmarked for a petrol station, in his Supporting Affidavit dated 26th November, 2009 at Paragraph 6 he describes annexes the extracts of the land register in respect of the following parcels of land: **KERICHO/CHE SINENDE/446, KERICHO/CHE SINENDE/447, KERICHO/CHE SINENDE/448, KERICHO/CHE SINENDE/449** and **KERICHO/CHE SINENDE/450**. It is noteworthy that neither of the two agreements made reference to the plot earmarked for the filling station which was clearly delineated on the map and application for change of user which was the main reference document at the time of sale. Furthermore, the plot earmarked for the filling station which the plaintiff is claiming does not consist of 5 plots measuring 50ft by 100ft. It is therefore my finding that the plots that were purchased by Rhoda Kandie are the 5 plots currently known as KERICHO/CHE SINENDE/ 446, 447, 448, 449 and 450.

18. The second issue for determination is whether the Plaintiff took possession of the 5 plots that they purchased. The Plaintiff testified that soon after purchasing the 5 plots they fenced them and put up a temporary structure which is still in existence. It is however clear from the evidence on record that what was fenced were not the 5 plots described above but the plot that was earmarked for a filling station. According to the evidence of PW2 and the defence witnesses, the fencing was done under tight security. If they were fencing the plots that they bought and paid for, one wonders why the fencing had to take place under such conditions.

19. The third issue that the court must determine is whether the agreement for sale of the 5 plots is still valid and enforceable. It is common ground that the land that was sold is agricultural land. As correctly submitted by counsel for the Plaintiff the transaction being one involving agricultural land was subject to consent by the relevant Land Control Board as provided under The Land Control Act, Cap 302, Laws of Kenya. The specific provision is Section 6 which is drawn as follows:-

6. (1) "Each of the following transactions -

(a) the **sale, transfer, lease, mortgage, exchange, partition** or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the **division of any such agricultural land into two or more parcels to be held under separate titles**, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

The late Cheruiyot Chemuren did not obtain consent of the land Control board and the land is still registered in his name. The sale is therefore legally null and void. Having said that, the defendant has indicated that she has no objection to transferring the 5 plots that were sold to the Plaintiff's mother so this option is still open to the plaintiff.

20. The fourth issue is whether the Plaintiff is entitled to the plot he took possession of by virtue of adverse possession. The Plaintiff confidently asserted that he took possession of the plot earmarked for the petrol station, fenced it and put up a temporary mabati structure. He therefore claims that having been in occupation of the said plot for a period in excess of 12 years, he is entitled to the same by virtue of adverse possession. Counsel for the Plaintiff submitted that the Applicant has established beyond a balance of probabilities acquisition, development, adverse possession and rightful entitlement to the suit plots by the Applicant. He pointed out that the fact of the Plaintiff's possession of the plots was evident during the site visit by the court. He therefore urged the court to find that the Plaintiff is entitled to the said plots by virtue of adverse possession.

21. On the other hand counsel for the Defendant submitted that there has never been any quiet nor peaceful possession of the disputed plot by the Plaintiff as evidenced by the documents filed and testimonies of the witnesses for both parties. The caution placed by Rhoda Kandie on the 5 plots which were denied by the Plaintiff, while stating that his mother only placed a caution on the mother title, indicates that there was a problem irrespective of which title or titles the caution was placed on. The witnesses also testified that there were numerous meetings to resolve the dispute arising from the sale. The fact that there was a subsequent similar agreement in relation to the very same plots more than

10 years after the initial agreement shows that there were issues all along and the Plaintiff cannot claim to have been in peaceful possession of the disputed parcel. It is equally important to note that his suit was filed within the same year of execution of the 2nd agreement.

22. Section 7 of the Limitations of Actions Act provides as follows:-

(a) "An action to recover land 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."

23. After the expiration of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.

24. Section 38(1) of the Act states as follows;

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he 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 a proprietor of the land."

25. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

"From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v saikwa (2) (supra).

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..."

26. Furthermore, in the case of **Alice Iminza Muhavi v Daniel Kiptabut A. Sang & Another [2010] eKLR** the court quoted and relied on the case of **Wambo v Njuguna (1983) KLR 172** where it was held that purchaser's interest and claim for adverse possession are two inconsistent interests and that is a conflict. The occupation can only be either with permission or adverse as the two concepts cannot co-exist.

27. Further in the case of **Samuel Miki Waweru –vs- Jane Njeri Richu C.A. NO.122 OF 2001 (unreported)** it was stated that:

"It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise" and again it was held that possession does not become adverse before the end of the period for which permission to occupy has been given see Jandis –vs- Kilipal (1975) E.A.225."

In this case the Plaintiff successfully resisted the eviction attempted by the Defendants and hence she has been in continued occupation since the sale of 24th June 1986. The sale agreement was therefore never repudiated at any time and as such, and as stated in the case of Sisto Wambugu v Kamau Njuguna (1982-88) 1 KLR – 217.

"a purchaser of land under a contract of sale who is in possession of the land cannot claim to be in adverse possession unless the contract of sale has first been repudiated as between the parties and in that case time starts to run from the date of the termination of the contract."

28. From the foregoing, it is my finding that the Plaintiff cannot assert that he has obtained title by adverse possession because he is a purchaser.

29. The fifth issue is whether the Plaintiff is entitled to the reliefs sought. In his Amended Originating Summons dated 8.4.2016, the Plaintiff seeks various reliefs.

30. The first one is a declaration that the Plaintiff has acquired title to the commercial plots measuring 0.046 acres each by adverse possession. In view in my finding on issue no. 4 above, this prayer cannot be granted.

31. The second relief sought is that declaratory orders of ownership be issued in favour of the applicant for five plots to be excised from Title No. KERICHO/KIPKELION/CHESINENDE/133. As alluded to elsewhere in this judgment, the defendant indicated that she has no objection to transferring the 5 plots (other than the one earmarked for the petrol station) to the plaintiff. Accordingly, and in the interest of substantive justice, the court is inclined to grant this prayer.

32. The third prayer is for extension of time within which consent of the Land Control Board should be granted in respect of the sub-division and/or transfer of 5 plots to be excised from Title No. KERICHO/KIPKELION/CHESINENDE/133. In furtherance of the third prayer I am also inclined to grant this particular prayer by extending the period by three months.

33. The fourth prayer is that the Defendant be ordered to sign the necessary documents to effect a valid transfer of the land in favour of the Plaintiff and in default the Executive Officer of this Honourable court to do so. I do grant this prayer.

34. Finally, on the issue of costs, the Plaintiff's main prayer for adverse possession has failed. Taking that into consideration and noting that it is the Plaintiff who dragged the Defendant to court, the Plaintiff shall bear the costs of this suit.

35. I therefore make the following final orders:

a) A declaration is hereby issued that the Plaintiff is entitled to 5 plots out of Title No. KERICHO/KIPKELION/CHESINENDE/133 that is to say title numbers KERICHO/CHESINENDE/446, 447, 448 449 and 450.

b) The time within which consent of the Land Control Board should be granted in respect of the sub-division and/or transfer of the 5 plots in (a) above is hereby extended by 90 days.

c) The Defendant is hereby ordered to sign the necessary documents to effect a valid transfer of the land in favour of the Plaintiff and in default the Executive Officer of this Honourable court to do so.

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

Dated, signed and delivered at Kericho this 24th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Sitati for Mr. Mengich for the Plaintiff

2. Mr. Joshua Mutai for the Defendant

3. Court assistant - Rotich