REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 671 OF 2012

DAVID KIPKOSGEI KIMELI.....PLAINTIFF

VS.

TITUS BARMASAI.....DEFENDANT

JUDGMENT

By an originating Summons dated 2nd December 2010 the plaintiff herein sued the defendant seeking for the following orders:

a) That the 4.3 Ha in parcels of land known as Uasin Gishu/Kipkabus Settlement Scheme/47 have now devolved to the plaintiff by adverse possession.

b) That the plaintiff is entitled to a declaration of title to the suit land by adverse possession and such a declaration be made and recorded.

c) That in the alternative an order of declaration be made that the defendant has been holding the title to the suit parcel in trust for the applicant/plaintiff.

d) That the plaintiff is entitled to an order of mandatory injunction compelling the District Land Registrar Uasin Gishu District, or any other District on which the land is situate to cause the registration of the applicant as the owner of the portion measuring 4.3 Ha and to delete any entries that may have been entered in the lands Register over parcel of land above against the interest of the applicant.

e) That the costs of this summons be provided for.

This suit was originally filed in the High Court vide Civil Suit No. 180 of 2010 before the Environment and Land Court came into existence. The case was allocated a new number once the Environment and Land Court was established.

Plaintiff's Case

PW1 gave evidence and stated that he had been living on the parcel of land since 1967 with his parents. He stated that he had built a semi permanent house on the farm and came to know that the defendant is the owner in 2010 who never gave him notice to vacate.

On cross-examination he stated that his father was polygamous and when his mother died she was buried at his grandfather's parcel of land since the land belonged to the government. He further stated that the land was to be issued to Kipchumba, but on 27th February 1998 it was issued to the defendant and that it was not true that he got to the land in 2000.

PW2 Samuel Chepkok testified that he has known the plaintiff from the early 1960's when he was born. He stated that the plaintiff's mother used to live on the suit plot and when the scheme was divided his mother got a share. On cross-examination he stated that the land belonged to EATEC, wattle trees had been planted there and that he did not know the defendant. On re-examination he affirmed that people living on the land were squatters who had been given the parcel of land.

Defence Case

DW1 adopted his statement and stated that he bought the suit land from Kipchumba Samuel Kipkapto and that he harvested his wattle trees in 2000 when he took possession. It was further his evidence that the plaintiff entered the suit land in October 2000 with his permission

since they came from the same clan.

DW1 stated that he asked the plaintiff to vacate the land in 2008 but the plaintiff was reluctant. He therefore filed a case to evict him vide HCCC No. 187/2012.

On cross-examination he stated that the title was issued on 7th February 1995 and that the land had been vacant when he bought it in 1993. He also testified that there were two houses when he visited the plot which had been allotted to Kipkapto in 1986.

DW1 further stated that he had allowed the plaintiff to use the land though he did not have any written document to confirm the same. In re-examination he affirmed that when buying the land, he went to see the land, where there were two houses that belonged to Kipkapto.

DW2 Kipchumba Samuel Kipkapto also adopted his statement and stated that he had been allotted the land in 1993. On cross-examination he testified that he transferred the land to the defendant. The land had trees and two grass thatched houses. He lived there for some time in 1993-1995.

DW3 Julius Kosgei adopted his statement as his evidence before the court.

On cross-examination he testified that he was employed by DW2 to care for the suit land in 1994, he had been living in Kipkabus by then. He was to take care of the wattle trees and to burn charcoal. He built two grass thatched houses and stayed in one but left employment in 2000. He stated that he never saw the plaintiff's parents while living there.

On further cross-examination DW3 testified that he stayed on the suit land for 4 years and he left in 2000, he later learnt that the land had been sold, he demolished the houses when he left.

Parties agreed to file written submissions but the plaintiff did not comply.

Defendant's Submission

It was the plaintiff's case that he had been in occupation of the land known as Uasin Gishu/Kipkabus Settlement Scheme/47 since his birth in 1967 and thus had acquired interest by operation of the law. An official search was produced as (Pex 1) and green card (pex 2) which indicated the defendant as the original owner. He had purchased the suit land from Kipchumba Samwel Kipkapto. The defendant allowed the plaintiff to harvest trees in 1995 however in 2008 when he asked the plaintiff to vacate he declined and filed this suit.

It was the defendant's submission that this court has jurisdiction under Section 13 of the Environment and Land Court Act as read together with section 150 of the Land Act and section 101 of the Land Registration Act. The plaintiff brought this suit under section 7 of the Limitation of Action Act which provided as follows:

> "*An action may not be brought by any person to recover land after the end of 12 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*."

Counsel submitted that the plaintiff had a burden to establish that the principle of adverse possession was met to be granted such orders.

Counsel cited the case of ***Mbira v. Gachuhi***(2002) IEALR 137 where it was held

> "*…a person who seeks to acquire title to land by the methid 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."*

It was Counsel's submission that the evidence on record showed that the defendant kept going back to his land, the plaintiff did not have an open and peaceful occupation. Filing of eviction case no. HCCC NO. 187/2012 showed the plaintiff did not have a quiet possession of the suit land. The defendant had allowed the plaintiff to the land thus his claim should fail, as was held in ***Wanja & Ors v. A.K Saika & Ors*** (1984) that a person who occupies another person's land with that other person's consent it cannot be said to be adverse possession because reality he has not dispossessed the owner.

Counsel also urged the court to find that the plaintiff failed has failed to meet the threshold provided by section 107, 108 and 109 of the Evidence Act.

The defendant was the registered owner by virtue of having the title deed as evidenced by production of the said documents. Counsel relied on Section 26(1) of the Land Registration Act states,

> "*The certificate of title issued by the registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner,, and the title of that proprietor shall not be subject to challenge except-*
>
> *On the ground of fraud or misrepresentation to which the person is proved to be a party or*

Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme"

Counsel further submitted that the defendant's rights and interest as the registered owner was in Section 25(1) of the Land Registration Act. No.3 of 2012 and further Article 40 of the Constitution gave every person the right either individually or in association with others to acquire and own property. That the occupation of the plaintiff on the suit land amounted to trespass and he should be evicted.

Counsel urged the court to dismiss the plaintiff's case and allow the defendant's counterclaim with costs.

Analysis and Determination

This is a case where the plaintiff prays that the court declares that he has acquired the suit land by way of adverse possession. In cases of adverse possession, the major issue for determination by the court is as to whether the plaintiff has met the threshold to warrant the court to give such orders. It is trite law that the test of adverse possession is whether the plaintiff has been in open, exclusive, continuous and uninterrupted occupation of the suit land. The defendant filed a counterclaim which must also be dealt with as an issue whether he is entitled to the orders sought in the counterclaim.

The plaintiff gave evidence that he had lived on the suit land since 1967 with the permission of the defendant who bought the suit land from DW2 who was allotted the land in 1993.That the defendant was registered as an owner of the suit land in 1995 pursuant to the sale agreement with DW2.

It should be noted that a claim of adverse possession is a claim which is based on the operation of the law. It takes away the right of a registered owner of land where a trespasser has occupied the owner's land for a period of 12 years and above. This trespasser can move the court urge the court to declare that he or she has acquired the land by way of adverse possession.

Coming to court to seek for orders of adverse possession is not a walk in the park. There are laid down principles which a party seeking to be declared as such must prove. If there were no such stringent rules put down to guide the court then every other person would walk into a person' s land and claim to be an adverse possessor. The threshold is meant to protect property rights of an individual as well the adverse possessor as provided for in the Constitution.

For a claim in adverse possession to succeed, the plaintiff ought to establish the following,

a) Exclusive use and possession of the property.

b) Open and notorious use of the property.

c) Non permissive, hostile or adverse use of the property

d) Continous/uninterrupted use of the property for a period of at least 12 years.

In ***Margret Wangui Njugi & 2 Ors V. George Kimani & Anor*** [2019] eKLR learned judge held that,

" *the common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of the land. To establish adverse possession, a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land. Secondly the claimant must prove that he has used the suit land without force, without secrecy and without persuasion for the prescribed limitation period of 12 years. Third he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth the possession must be continuous; it must not be broken or interrupted."*

From the evidence on record it is not in dispute that the suit land initially belonged to EATEC. The plaintiff's evidence was contradictory by claiming that he had been living on the suit land since 1967 and later also stated that he resided with the mother who was an employee of East Africa Tanning Company(EATEC) who was unlucky not to have gotten land when EATEC left. He further contradicted himself by stating that the mother was allocated land when survey was done between 1985-1986. PW 2 also gave contradictory evidence to what the plaintiff had sated in respect of the suit land.

The defendant averred that he had bought the land from DW2 who had been allotted the land in 1986, and his title was issued on 7th February 1995, but took possession in 2000 since he had to allow DW2 to harvest his wattle trees as he had requested. It is further on record that the defendant allowed the plaintiff to use his land although the same was not in writing. He stated that when he asked the plaintiff to vacate in 2008, the plaintiff requested that he be allowed to stay on for one more year of which he agreed.

This evidence puts the plaintiff's case for adverse possession in the line as he has not met the threshold for grant of the orders sought. The ingredients of adverse possession of exclusive use and possession of the property, open and notorious use of the property, non-permissive, hostile or adverse use of the property have not been proved by the plaintiff.

DW3's evidence that he had put up two mud grass thatched houses does not tally with the report on scene visit which indicated that there was no sign of a homestead. Further it was DW2's evidence that there was nothing on the land when it was allocated to him save for a few wattle trees, he added that he occasionally stayed on the land and the plaintiff's family was not on the land when he was allocated the same.

In the case of ***Wambugu v. Njuguna*** (1983) KLR 174 it was held that:

> "*in order for a person to acquire title by operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the suit for purposes for which he intended to use it. The plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle to the suit land by adverse possession."*

The plaintiff had an uphill task to prove that he had dispossessed the defendant from the suit land and is therefore entitled to be registered as an owner. Had the plaintiff established that he has been in possession of the suit land without any interruption then this court would have been bound by the **Court of Appeal decision in Chevron(K) Ltd v. Harrison Charo Wa Shutu [2016] eKLR** where the court held as follows,

> '*We remind ourselves of the rationale of this method of acquiring land by adverse possession as explained in the following passage from the decision in* ***Adnam*** *v* ***Earl of Sandwich*** *(1877) 2QB 485.*
>
> "*The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties* **"**

I have considered the pleadings in totality, the evidence and authorities cited and find that the plaintiff has not met the threshold for grant of the orders of adverse possession. The plaintiff's case must therefore fail and the defendant's

counterclaim is hereby allowed. I therefore make the following orders.

a) The plaintiff's suit is dismissed with costs to the defendant.

b) The plaintiff to give vacant possession of the suit land within 30 days failure of which eviction orders to issue.

Dated and delivered at Eldoret on this 13th day of May, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ in open court in the presence of Miss.Cheso for the Defendant and in the absence of Counsel for the Plaintiff. Plaintiff present.

Mr.Mwelem – Court Assistant