



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 19 OF 2014 (O.S)**

**VERONICA NALIKA PETER.....PLAINTIFF**

**VERSUS**

**CHEMA HOLDINGS LIMITED.....DEFENDANT**

**JUDGMENT**

**The Plaintiff's Case**

1. This suit was commenced vide an originating summons dated **23/1/2014** seeking a declaration that the defendant's right to recover the portion of land occupied by the plaintiff and his family is barred under **Section 7** of the **Limitation of Actions Act Cap 22**, a declaration that the plaintiff is entitled to be registered forthwith as the owner of the said portion by reason of adverse possession since the year **1952** to date; that the defendant's right and title to the land has been extinguished in favour of the plaintiff and an order that the respondent do give a road of access and cause subdivision of **Land Reference No. 6650 (IR No. 19633)** and a portion thereof measuring **2.3 acres** (hereinafter also alternately referred to as "*the suit land*") be transferred and registered in the name of the plaintiff and in default the Deputy Registrar of this court do execute all necessary documents to effect the subdivision and transfer.

2. A supporting affidavit of the plaintiff accompanied the originating summons. In that affidavit the plaintiff depones that he and his family have been in occupation of the suit land, having gained access to it from **1952** by virtue of the plaintiff's employment with one Mr. Owen, a white settler who then owned the land.

3. Mr. Owen is said to have allowed the plaintiff to exclusively utilize the land and there were visible boundaries to the said land. After Mr. Owen exited the scene successive owners took over the land but left the plaintiff and his family in occupation of the same. Finally an owner by the name Hon. Zakayo Chesoni took over the land ownership and management in **1972** and continued to utilize the plaintiff's services as an employee until **1983**.

4. Subsequently the land was transferred to the defendant, a company owned by Mr. Chesoni. The plaintiff depones that the boundaries to the land were identified to him and he conducted developments on the land. Among these were trees which he planted along the boundaries to the land thus enclosing it. He and his children also constructed a grass thatched homestead on the suit land. However in the year **2000** the defendant made an attempt to interfere with the plaintiff's occupation and use of the land by asking him to cease ploughing it. Upon intervention by an organization called Justice and Peace Programme under the auspices of the Catholic Diocese of Kitale the defendant ceased all threats.

5. The plaintiff averred that he has resided on the suit land for **61** years. He also averred that though other occupants in circumstances similar to his were relocated and settled by the defendant upon other portions on the said farm he did not benefit from a similar arrangement, hence this suit.

6. The original plaintiff passed on in **2017** during the pendency of this suit and was substituted with the current plaintiff who holds the position of administrator to the deceased, being his widow.

**The Defendant's Defence**

7. The suit is opposed. The defendant filed the replying affidavit of **Mary Aherwa Chesoni** on **29/4/2014**. She depones that the plan attached to the supporting affidavit is of unknown origin hence inadmissible in evidence; that the defendant was not the owner of the land as at the time the plaintiff gained access to it and occupied it; that the claim that the plaintiff began occupying the land in **1972** is false as his occupation began in **1975**; that that occupation was allowed on the basis that the plaintiff worked for the late Hon. Chesoni and subsequently as an employee of the defendant; that the continued occupation was on the basis of his employment as described above and that he was only

permitted to conduct subsistence farming thereon; that since the plaintiff admits to have been shown the boundaries, that implies that he entered into possession with the consent of the proprietor and so the plaintiff's occupation of the land can not be deemed as adverse; that the plaintiff has not proved that he dispossessed the defendant of its land; that the services of the plaintiff were terminated and he was asked to vacate the land but he remained thereon yet none of his relatives work for the defendant; that the claim is defective for not exhibiting a certified copy of the extract of title to the land; that the plaintiff has admitted in his affidavit that his stay on the suit land was at one time interrupted; that since 1983 when his services were terminated and he was asked to vacate, he has not been in continuous occupation; that the plaintiff has another parcel of land elsewhere where he buried his father and daughter; that employees on the farm were not given land but were resettled on other portions as employees while non-employees left the farm for unknown places; that the orders of this court in such matters as this are discretionary and equitable. She finally depones that the plaintiff has failed to satisfy the requirements of adverse possession to warrant the grant of the orders sought.

### **The Plaintiff's Rejoinder to the Replying Affidavit**

8. The plaintiff filed a further affidavit on 28/5/2014 and reiterated the matters in the originating summons and the supporting affidavit. He emphasized that the defendant found him on the land and no agreement or permission from the defendant granted him the land and his occupation of the suit land began in 1952.

### **Hearing**

9. *Status quo* on the ground was maintained earlier on in these proceedings. The plaintiff's case was heard and closed on the 26/5/2015. Only the plaintiff testified in his case. The defendant's case was heard and closed on 19/3/2019. Only the defendant's manager testified in the defendant's case.

10. Thereafter, the court ordered parties to file final submissions and the plaintiff filed his on the 24/4/2019 while the defendant filed none.

### **The Evidence of the Parties**

11. Evidence of the parties closely followed the contents of their respective affidavits. The original plaintiff, giving sworn evidence stated that though he had earlier worked as a milkman on the farm, he no longer works; that he has been residing on the suit land since 1952; that he was born on the farm; that his father used to work for the farm owners. He produced photographic evidence showing the developments on the suit land including trees, houses crops and fences. He also produced a certified copy of the extract of title to **Land Reference 6650 (IR 19633)**. He also produced a sketch showing the location of the suit land on the farm.

12. Upon cross examination by Mr. Wanyama for the defendant the plaintiff averred that it is his father who works for Mr. Owen, the erstwhile proprietor of the land and that the plaintiff only began working on the farm as an employee of the defendant. He asserted that he never moved out of the land despite demands by the defendant.

13. The witness for the defendant was one Hudson Khakame, its manager and brother to the late Hon. Chesoni. He testified on 19/3/2019 and adopted his written statement dated 18/10/18. In his evidence he stated that he commenced his employment with the defendant in 2017; that the land is 690 acres; the deceased Peter Kutoyi worked for the defendant but was later sacked in 1983 from his employment by the defendant for stealing milk; that workers were normally accorded a place to reside in on the farm and when one was sacked he was supposed to vacate the land; that Peter Kutoyi was charged and imprisoned; that however he insisted on remaining on the suit land and the defendant has been trying to force him out of the suit land to no avail.

### **Determination**

#### **Issues for Determination**

**a. Is the plaintiff entitled by virtue of adverse possession to registration of title in her name as the proprietor of 2.3 acres of land out of Land Reference No. 6650 (IR No 19633)?**

**b. What orders should issue?**

**a. Is the plaintiff entitled by virtue of adverse possession to registration of title in her name as the proprietor of 2.3 acres of land out of Land Reference No 6650 (IR No 19633)?**

14. To prove entitlement under adverse possession a claimant must prove that he has been in occupation of the suit land *nec per vim, nec clam, nec precario*.

15. Broken down into a simpler form the requirements of adverse possession are that the claimant must establish that he has been in uninterrupted possession for a period of 12 years and that his possession was obtained without force or secrecy.

16. In my view the defendant's witness admitted that the plaintiff's family has never been evicted from the suit land. In the circumstances, whether its occupation began in 1952 or 1972 or 1975 that occupation has been uninterrupted. It is noteworthy that this suit was also filed while the plaintiff's family was still on the suit land.

17. Does the fact that the possession began by way of an employment contract vitiate the occupation to the extent that orders under the doctrine of adverse possession can not issue?

18. There is a dispute as to when the plaintiff was employed on the farm. He maintained in his evidence that he was employed by Mr. Owen. On cross examination however he admitted that it is his father who was employed by Mr. Owen. He however maintained in his evidence and documents that he was employed in **1952**. The evidence of the defendant however is that the plaintiff was employed and was allowed to be in possession of the suit land in **1975**.

19. It being clear by way of admission by both sides that the plaintiff entered into possession by virtue of his employment and the question of when he was so employed not being easily answered, and possession up to the date of the filing of the suit having been established, this court must shift to the question of when the plaintiff ceased to have right to occupation of the land as that is the only date from which the period of occupation can be calculated from for the purpose of determining his claim under adverse possession.

20. The evidence of both parties is that he ceased being an employee to the defendant in **1983**. According to the defendant's evidence employees whose service contracts with the defendant ceased were required to vacate the land as they were no longer workers.

21. In my view, from the year **1983** therefore the plaintiff ceased having any right to reside on the suit land and the defendant became entitled to order him to vacate the suit land after obtaining eviction orders on that basis. The fact of cessation of the services of the plaintiff must have been known to the defendant, his employer, but the defendant never evicted the plaintiff.

22. Any continued occupation of the suit land by the plaintiff, with the defendant's knowledge must be deemed adverse to the defendant's title and the period of time for the purposes of adverse possession must be calculated from **1983**.

23. The earliest recorded demand that the plaintiff do vacate the land was made in the year **2000**, some **17** odd years after the plaintiff's services were terminated. The defendant therefore acquiesced the plaintiff's occupation of part of its land.

24. I find that the plaintiff continued with his possession of the premises after cessation of his employment with the knowledge of the defendant, without force and without secrecy, and his family is still resident on the suit land to date.

25. Only action by the defendant to terminate the plaintiff's possession before the expiry of **12** years from **1983** could have stopped the time from running for the purposes of adverse possession. The defendant did nothing and the plaintiff was still in possession by the time this suit was filed. Time continued running till the date of filing suit.

26. On the issue of whether the plaintiff provided proof of the defendant's proprietorship of the land, I find that the copy of certified extract of title, the original of which was produced at the hearing in evidence is sufficient to establish ownership and the defendant's objection on this ground has no merit.

27. I must also examine whether the plaintiff has established with specificity the portion that he claims out of the defendant's farm. His evidence shows that he seeks to be registered owner over a specific portion whose boundaries are demarcated and clearly marked by trees and whose sketch he produced as evidence in court. I do not find any evidence from the defendant contradicting the existence of such a well-defined portion or showing that it is not within the farm owned by the plaintiff comprised in **Land Reference No 6650 (IR No 19633)**.

28. I am therefore of the view that the plaintiff has established the identity of the portion of land that she seeks to be registered as proprietor of under the doctrine of adverse possession.

**b. What orders should issue?**

29. The upshot of the above analysis is that I find that the plaintiff has established her claim against the defendant on a balance of probabilities and that the orders she seeks are deserved.

30. I therefore enter judgement in favour of the plaintiff against the defendant and issue the following orders:

**a. A declaration that the defendant's right to recover the portion of land occupied by the plaintiff being part of LR No. 6650 (IR 19633) is barred by the provisions of section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya and its title thereto is extinguished in favour of the plaintiff.**

**b. A declaration that the applicant having been in possession of the suit land openly, continuously and peacefully for a period in excess of 12 years is entitled to be registered as proprietor thereof under the doctrine of adverse possession.**

**c. An order that the portion occupied by the plaintiff including a road of access serving that portion shall be surveyed and excised and registered in the plaintiff's name.**

**d. An order that the defendant shall execute all the documents necessary to effect the survey and excision of the suit land from LR 6650 (IR 19633) and transfer to the plaintiff and in default the Deputy Registrar of this court shall execute the said documents required to effect such survey excision and transfer to the plaintiff.**

**e. The defendant shall bear the costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale on this 18<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Bett for Plaintiff

N/A for the Defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**