



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

CIVIL SUIT NO 78 OF 2002 (O.S)

KIPKETER A. CHEPKWONY.....PLAINTIFF

VERSUS

ISAYA A. KITUR.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit by way of Originating Summons dated 21st November 2002 seeking the following reliefs:

- a) The Plaintiff be declared to have been entitled to the whole 0.8 hectares comprised in L.R No. KERICHO/KAPKATET/1449 registered under the Registered Land Act (Cap 300 of the Laws of Kenya) and situated in Bureti District by virtue of the Plaintiff's adverse possession of the said land for a period of over 20 years.
- b) The Plaintiff be registered as a proprietor of all that parcel of land known as L.R No. KERICHO/KAPKATET/1449 in place of the Defendant who is at present the registered owner of the suit land
- c) The costs of this suit be provided for.

2. The Originating summons was supported by the Plaintiff's affidavit sworn on the 15th November 2002. Despite being served with the Originating Summons, the Defendant did not file any response but nonetheless participated in the hearing where both parties testified and the plaintiff called three witnesses.

Plaintiff's Case

3. The Plaintiff testified that in or about 1977, he purchased 2 acres now comprised in that parcel of land known as L.R No. KERICHO/KAKATET/1449 from the Defendant who is the registered owner thereof at a consideration of Kshs. 400. He produced a certified copy of the register in respect of the suit property as Plaintiff's exhibit 1. He stated that after purchasing the suit property, he took possession thereof and planted wattle, blue gum, cypress and other indigenous trees. The Plaintiff refused to transfer the suit property to the plaintiff but he remained in peaceful occupation thereof for a period of about 20 years when the plaintiff became hostile to him. In the year 2002, the Plaintiff filed a case against the Plaintiff at the Bureti Land Disputes Tribunal and the Tribunal found in the plaintiff's favour.

4. Upon cross-examination, the Plaintiff reiterated that though he had worked for the Plaintiff for a period of three years, he ended up purchasing the suit property from him for a consideration of Kshs. 400 when the defendant's brother declined to purchase it. He stated that the defendant had never utilized the suit property and only started protesting the Plaintiff's use and occupation thereof sometime in the year 1999 of thereabouts.

5. The Plaintiffs' witnesses who testified as PW2, PW3 AND PW4 all corroborated the Plaintiff's evidence that the plaintiff had utilized the suit property to the exclusion of the defendant.

Defendant's Case

6. The defendant testified that he was the registered owner of the suit property. He stated that the land was fallow and that nobody lived in it. He stated that he had not visited the suit property in many years and that he did not know if the Plaintiff was utilizing it. He however denied that he had sold it to the Plaintiff.

Issues for determination

7. From the pleading and evidence adduced at the hearing, the following issues arise for determination:

- a) Whether the Plaintiff has been in occupation of all that property known as L.R No. KERICHO/KAPKATET/1449 for a period in excess of 12 years
- b) Whether the Plaintiff's occupation if any has been quiet, peaceful, un-interrupted, hostile and /or exclusive?
- c) Whether the Plaintiff is entitled to the reliefs sought.

Analysis and determination

8. It was the Plaintiff's uncontroverted evidence that he had been in quiet, peaceful and open occupation of the suit property for a period of over 20 years since he purchased it in 1977. His evidence was corroborated by his three witnesses. The defendant confessed that he had not been to the suit property for many years and he was not aware if the plaintiff was in occupation thereof.

9. In the case of **Ann Itumbi Kiseli V James Muriuki Murithi 2013) eKLR** the court restated the position on adverse possession as follows:

“Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile possession of it to the exclusion of its owner for the period prescribed by statute. For one to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land 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 soil for which he intended to use it”.

10. In the case of **Kasuve v Mwanja Investments Limited & 4 Others [2004] eKLR** the Court of Appeal stated as follows:

“In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition (emphasis ours)”

11. Similarly, in **Celina Muthoni Kithinji v Safiya Binti Swaleh & Others [2018] eKLR** the court stated that:

“It is also a well settled principle that a party claiming Adverse Possession ought to prove that the possession was “nec vi, nec clam, nec precario”, that is peaceful, open and continuous. The possession should not have been through force, nor in secrecy and without the authority or permission of the owner. 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”

12. The Plaintiff testified that he had been in exclusive possession of the suit property for a period of more than 20 years, from 1977 to 1999 and that he had planted a variety of trees on the land. The Defendant did not dispute this fact as he admitted that he had not visited the suit property for many years and he could not tell whether the Plaintiff was utilizing it.

13. Even though the Defendant denied selling the suit property to the Plaintiff, it is evident that he was long dispossessed of the suit property. In **Public Trustee v Wanduru [1984] KLR 314** the Court of Appeal held that:

“The position of a vendor and a purchaser of registered land is this; The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession, the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession”

14. The court therefore of the view that a purchaser in possession of the land, after having paid the purchase price is a person in whose favour the period of limitation can run as against the vendor under section of the Limitation of Actions Act. This position was reaffirmed in the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR**.

15. In view of the foregoing, it is my finding that the Plaintiff is in adverse possession of the suit property and is therefore entitled to be registered as the owner thereof by virtue of Section 38 of the Limitation of Actions Act.

16. The upshot is that the Plaintiff has proved his case on a balance of probabilities and I enter judgment in his favour and make the following final orders:

- a) It is hereby declared that the Plaintiff is entitled to the whole 0.8 hectares comprised in L.R No. KERICHO/KAPKATET/1449 registered under the Registered Land Act (Cap 300 of the Laws of Kenya) and situated in Bureti District by virtue of the Plaintiff's adverse possession.

b) It is hereby directed that the Plaintiff be registered as a proprietor of all that parcel of land known as L.R No. KERICHO/KAPKATET/1449 in place of the Defendant who is at present the registered owner of the suit land.

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

Dated, signed and delivered at Kericho this 12th day of July, 2019.

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J.M ONYANGO

JUDGE

In the presence of :

1. Mr. Koech for the Plaintiff
2. Mr. Ngeno for the Defendant
3. Court Assistant: Rotich