



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E & L NO.939 OF 2012**

**MULTI TRACK**

**ROSEMARY MUMAKWA.....PLAINTIFF**

**VERSUS**

**MAGDALINE S.ISWETA.....1<sup>ST</sup> DEFENDANT**

**DANIEL KIPKOSGEI CHESIRE.....2<sup>ND</sup> DEFENDANT**

**CLEMENT KIPKOECH KORAT.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By an originating Summons dated 30<sup>th</sup> April 2011 and amended on 22<sup>nd</sup> June 2012, the applicant herein sought for the following orders:

- a) That she has obtained title over land Parcel Nos.Uasin Gishu/ Kimumu Scheme/5690 and Uasin Gishu/Kimumu Scheme/5691 by adverse possession.
- b) The Defendants' title over the land parcel has been extinguished by lapse of time.
- c) The Defendants' title over land parcel Nos. Uasin Gishu/Kimumu Scheme/ 5690 and Uasin Gishu/Kimumu Scheme/ 5691 did not resuscitate the title or defeat the Plaintiff's claim.
- d) A vesting order do accordingly issue, vesting the land parcel Nos. Uasin Gishu/ Kimumu Scheme/ 5690 and Uasin Gishu/ Kimumu Scheme/ 5691.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their respective replying affidavits but the 3<sup>rd</sup> Defendant who is the current registered owner neither filed a response nor tendered any evidence and therefore the claim is unopposed.

**PLAINTIFF'S CASE**

It is the Plaintiff's case that she bought 0.25 acres out of land parcel No.Uasin Gishu/Kimumu Scheme/ 400 at a sum of Ksh. 36,000/- from the 1<sup>st</sup> Defendant on 12<sup>th</sup> December 1991 as per the sale agreement of the same date.

The plaintiff further stated that the 1<sup>st</sup> Defendant was issued with a title deed on 18<sup>th</sup> April 1989 whereby she continued being the registered owner of the same including after the subsequent subdivisions till 23<sup>rd</sup> October 2010. It was the plaintiff's evidence that she took possession of the parcel of land and has been using it to date without interruptions from any of the Defendants.

The plaintiff also stated that she has planted trees and constructed a house on the said plot and other developments of which she produced photos to prove the same. That the record from the lands registry indicate that the parcel has undergone the following subdivisions:

- a) Land parcel No. Uasin Gishu/Kimumu Settlement Scheme/ 400 was subdivided into 1591, 1520, 1521, 1522 and 1523 on 15<sup>th</sup> March 2001.
- b) Land parcel No. Uasin Gishu/Kimumu Settlement Scheme/ 1522 was subdivided into 5686 — 5691 (where 5691 and 5692 were inclusive) on 23<sup>rd</sup> December 2010, 7 years' after Limitation period.

From the 1st Defendant's Replying Affidavit dated 8<sup>th</sup> June /2011, she confirms that she sold land to the Plaintiff on 12<sup>th</sup> December 1991 and sold another part to the 2<sup>nd</sup> Defendant. She also avers that the 2<sup>nd</sup> Defendant was in fact intruding and/or trespassing the Plaintiff's land. She further stated in her affidavit that parcel No. Uasin Gishu/Kimumu Scheme/ 5691 belongs to the Plaintiff and not the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant obtained his title fraudulently. The 1<sup>st</sup> defendant recorded a consent transferring land parcel No. Uasin Gishu/Kimumu Scheme/ 5690 to the Plaintiff confirming that the same was legally hers, by way of adverse possession.

The 2<sup>nd</sup> Defendant's affidavits dated 15/6/2011 and 23<sup>rd</sup> July 2012 respectively averred to be the registered owner of the land referred Uasin Gishu/Kimumu Scheme/ 5691 having a title issued on 28<sup>th</sup> December 2010. The 2<sup>nd</sup> defendant did not tender any evidence to enable the affidavits filed be subjected to cross examination. From the affidavit and the plaintiff's evidence, it is evident that the 2<sup>nd</sup> defendant never took possession.

It was the plaintiff's evidence that the 3<sup>rd</sup> Defendant was enjoined to the suit for having been the new registered owner of land parcel No. Uasin Gishu/Kimumu Scheme/ 5691 after the 2<sup>nd</sup> Defendant transferred the same to him on 15<sup>th</sup> June 2011 after commencement of the suit but he did not defend the claim. He also never took possession of the suit land.

The plaintiff therefore urged the court to find that she has obtained land parcel No. Uasin Gishu/Kimumu Scheme/ 5691 by way of adverse possession.

### **PLAINTIFF'S SUBMISSION**

Counsel for the plaintiff filed submissions and stated that the issue for determination is whether the plaintiff has proved the ingredients of adverse possession against the defendants.

Counsel submitted that there was no evidence from the Defendants that they had tried to assert their right by taking possession or legal proceedings for the past 28 years. That the 1<sup>st</sup> Defendant agreed that as the seller of the land, the Plaintiff is the legal owner. Further that the Plaintiff has always used the land to the exclusion of the Defendants and the same is supported by the Affidavit by the 1<sup>st</sup> Defendant who was the original owner of the land and the owner when the limitation was running and on 12<sup>th</sup> December 2003 when prescriptive rights crystallized.

Mr. Magare also submitted that the Plaintiff gained the right to be the registered proprietor of the land parcel Nos. Uasin Gishu/Kimumu Scheme/ 5690 and Uasin Gishu/Kimumu Scheme/ 5691 on 12<sup>th</sup> December 2003 when 12 years lapsed from 12<sup>th</sup> December 1991. Further that the registered proprietors namely the 1<sup>st</sup> registered owner, Magdaline Isweta, 2<sup>nd</sup> registered owner Daniel Chesire and the current registered owner Clement Korat did not tender any evidence and that the 1<sup>st</sup> and 3<sup>rd</sup> registered owners conceded to the claim.

Counsel cited the case of **Eliud Nyongesa Lusenaka & Another vs= Nathan Wekesa Omocha in Kisumu Court of Appeal NO. 134 of 1993 where** the Court of Appeal held as follows:-

*..We think, the 1<sup>st</sup> Appellant had sufficient title in the land against which the respondent could acquire prescriptive rights through adverse possession and the matter between the 1<sup>st</sup> appellant and the respondent had nothing to do with the interest of the SFT in the disputed land".*

**Counsel further cited the case of Felix Kipchoge Limo Lang'at vs= Robinson Kiplagat Tuwei, In Eldoret E & L No. 215 of 2010- where this court held as follows:**

*"The seller could not validly transfer the land to the Defendant as her interest had already been extinguished either by virtue of adverse possession or by constructive trust. The issue of identification of the land being claimed is clear as the Plaintiff stated that he is claiming 2.1 acres of land which he bought and took possession of. This is distinctive and can be ascertained."*

Mr. Magare also submitted that it is worth noting that the defendants did not offer any defence to this claim and under Order 2 Rule 4(1 & 2) of the Civil Procedure Rules, the Defendant is bound by its pleading and cannot raise any defence at submission level when none was raised. Counsel therefore urged the court to grant the orders as prayed in favour of the plaintiff.

### **ANALYSIS AND DETERMINATION**

The issue for determination is as to whether the plaintiff has proved the ingredients of adverse possession and who is to pay costs of this suit.

Vide a consent dated 6<sup>th</sup> June 2011 the plaintiff and the 1<sup>st</sup> defendants agreed that land parcel No. UASIN GISHU/KIMUMU SCHEME/5690 be transferred to the plaintiff and a vesting order do issue accordingly. That the 1<sup>st</sup> defendant do give the plaintiff the original title deed within 14 days from the date of the consent. They further agreed that the issues regarding parcel No. UASIN GISHU/KIMUMU/5691 be dealt with during the full hearing. Each party was to bear their own costs as regards the consent.

During the hearing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as indicated by Counsel stated that they were not calling any evidence.

It was the Plaintiff's evidence that she bought 0.25 acres from the 1<sup>st</sup> Defendant and is currently occupying Uasin Gishu/ Kimumu Scheme/

5690 now registered in her name and Uasin Gishu/Kimumu Scheme/ 5691 which is registered to the 3<sup>rd</sup> Defendant's name.

This is a suit that is uncontroverted as the 1<sup>st</sup> defendant conceded vide a consent order and transferred the parcel No. Uasin Gishu/ Kimumu Scheme/ 5690 to the plaintiff as per the consent dated 6<sup>th</sup> June 2011. This consent saved the court's time and restored the land to the plaintiff.

From the plaintiff's evidence it is clear that the suit land belonged to the plaintiff who has been in occupation for a period of more than 12 years in fact to be precise more than 28 years. The defendants did not tender any evidence to counter the assertion of the plaintiff.

Even though the 1<sup>st</sup> and 3<sup>rd</sup> defendant filed affidavits in reply to the claim, it is trite law that pleadings only contain averments of parties which must be proved by subjecting them to cross examination to prove or disprove them.

In the case of **CMC Aviation Ltd vs Cruisair Ltd (No. 1) KLR 103; (1976-80) 1 KLR 835, wherein Madan, J** (as he was then) expressed himself as hereunder:

*"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of 'evidence' as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evidence to the mind that it is truth."*

The fact that the affidavits were not subjected to cross examination of the makers, makes them mere statements which can be treated as one party's word against the other's. I will therefore treat them as mere statements.

The ingredients of adverse possession were discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** where it was 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."*

From the evidence on record I find that the plaintiff has proved that she took possession of the suit land, asserted her rights over it and that the registered owner omitted or neglected to take any action against the plaintiff. The plaintiff has also proved that she has been in continuous occupation without interruption by anyone including the defendants.

Mr. Kamau Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants submitted on only one issue as to payment of costs. It was his submission that the 1<sup>st</sup> defendant conceded and entered into a consent which amicably solved the issue and therefore should not be liable to pay costs.

That the consent order was binding between the 1<sup>st</sup> defendant and the plaintiff hence the 1<sup>st</sup> defendant had fulfilled her obligation and handed over the original title to the plaintiff.

I have considered the pleadings the evidence on record and find that the plaintiff has proved her case against the defendants on a balance of probabilities. The issue of costs by the 1<sup>st</sup> defendant had already been determined by the consent order which indicated that each party to bear their own costs. I therefore enter judgement in the following terms.

- a) A declaration is hereby issued that the plaintiff has obtained title over land Parcel Nos. Uasin Gishu/ Kimumu Scheme/5690 and Uasin Gishu/Kimumu Scheme/5691 by adverse possession and the defendants title over the land parcel has been extinguished by lapse of time.
- b) A vesting order is hereby issued, vesting the land parcel Nos. Uasin Gishu/ Kimumu Scheme/ 5690 and Uasin Gishu/ Kimumu Scheme/ 5691 to the plaintiff.
- c) Costs to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**Dated and delivered at Eldoret on this 7<sup>th</sup> day of August, 2019.**

**M.A. ODENY**

**JUDGE**

**JUDGMENT READ IN OPEN COURT** in the presence of Mr.Kipkirui holding brief for Mr.Magare for Plaintiff, Miss.Khandambi for 1<sup>st</sup> Defendant and in the absence of Mr.Momanyi for 2<sup>nd</sup> Defendant.

Mr.Koech – Court Assistant