



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 337 OF 2014 (O.S)**

**IN THE MATTER OF SECTION 38 RULE 7 OF THE CIVIL PROCEDURE RULES (2010)**

**BETWEEN**

**RONALD SOME NGELECHEI..... APPLICANT**

**AND**

**DICKSON KIPTOO MOROGO.....1<sup>ST</sup> RESPONDENT**

**LILY JEPKORIR MOROGO.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Ronald Some Ngelechei (hereinafter referred to as the Plaintiff)**, has come to court against **Dickson Kiptoo Morogo and Lily Jepkorir Morogo (hereinafter referred to as the defendants)** claiming to be entitled to the land known as Land Parcel known as LR NO.5593 measuring 20 acres situate at Tapsagoi in Turbo, Uasin-Gishu County by adverse possession and therefore for determination of the following question.

- a) *Whether or not the Applicant has been in exclusive, open, peaceful continuous and uninterrupted occupation, possession and use of a portion of that parcel of land known as L.R. No. 5593 measuring 20 acres for a period of over 12 years (in fact over 38 years) as of right and has acquired title and ownership of the said parcel by virtue of adverse possession;*
- b) *Whether or not a declaration and a finding be made that upon expiry of twelve (12) years from the year 1976 the Title of the Respondents on behalf of the estate of the late KAPTICH MOROGO to a portion of the land parcel known as L.R. No. 5593 measuring 20 acres became extinguished at law and that the Respondent only hold§ the Title in trust for the Applicant;*
- c) *Whether or not a declaration should issue that the Respondents' Title to the said portion of the aforesaid parcel of land be cancelled forthwith and an order be issued transferring Title thereto to the Applicant and vesting the same in him.*
- d) *Who should bear the costs of the application?*

The plaintiff claims sometimes in June 1976, he was approached by the late Kaptich Morogo in respect of whose estate the defendants herein are the administrators to help bail him out as his parcel of land known as L.R. No. 5593 which was due to be auctioned by the Settlement Fund Trustees on 29<sup>th</sup> July, 1976 over loan arrears amounting to Kshs.18,900. The late KAPTICH MOROGO undertook to share the parcel of land equally with the plaintiff upon repaying the full loan arrears. The land measured 122 acres hence he assured him that he would take up 61 acres.

The plaintiff accompanied the late KAPTICH MOROGO to the Settlement Fund Trustees offices in Nairobi where he paid the said Kshs.18,900/- and was issued with an official receipt in the name of the Deceased but with an acknowledgment that it was paid by the plaintiff. The plaintiff also paid Kshs.800 to Elgon Auctioneers in Nakuru who were due to undertake the auction sale as their fees. He made the final payment of Kshs.10,000 in cash to the Deceased personally at Eldoret town upon being informed that the loan from the Agricultural Finance Corporation would not be paid in cash as they were interested in the crop grown on the farm.

The Deceased later reneged on his earlier undertaking to share the farm equally with the Applicant and insisted that he was selling a portion thereof to the Applicant equivalent to the money he had paid to him. He stated that he was selling an acre for Kshs.700 thereby entitling the Applicant to 41 acres as he had paid Kshs.28,900. The deceased stated that 1 acre would cater for access roads and other utilities at the farm. They thus entered into a Sale Agreement for the sale of 40 acres.

The Deceased later declined to seek consent to transfer the agreed portion to the plaintiff and instead insisted that they enter into a fresh

agreement based on a new sale price (Kshs.900 per acre). Since the Applicant had already sold off his only parcel of land in Kitale to pay the sum he had paid and had already moved to the Deceased person's farm with his entire family, he accepted the deceased person's terms.

It was agreed that the new acreage entitled to the Applicant would be 31 acres but the Deceased insisted that he would enter into a Sale Agreement in respect of 20 acres at the portion the Applicant had built his house while he would later show him the location of the remaining 11 acres for which a fresh agreement would be entered into.

By a Sale Agreement dated 29<sup>th</sup> June 1976, the plaintiff entered into a Sale Agreement with the Deceased whereupon he purchased 20 acres out of the deceased person's parcel of land known as L.R. No. 5593 at an agreed purchase price of Kenya Shillings Eighteen Thousand (Kshs.18,000).

The Deceased confirmed this sale by a letter dated 16<sup>th</sup> May, 1979 to the Commissioner of Lands. He also filed an application for consent to the Land Control Board but was advised to fill a fresh form as he informed the Board that he had other purchasers to whom he intended to transfer their respective portions. From then on, the Deceased never again made an application for consent to sub-divide his land and transfer the same to his purchasers, the Applicant included.

The defendants state that the Late Kaptich Morogo was their father and registered owner of Parcel Number LR.NO.5593. The deceased never visited the home to the plaintiff in Trans-Nzoia and never asked the Applicant to assist in Loan clearance though he had loan arrears in respect of the settlement from Trustees.

They state that the deceased never undertook to share the parcel of land equally with the applicant. The plaintiff never accompanied the deceased to Settlement Fund Trustees offices in Nairobi.

The defendants state that the plaintiff entered into agreement with the deceased for purchase of 20 acres out of the deceased's land L. R. NO. 5593. the Applicant did not complete the purchase price and therefore there was a dispute over it. The village Elder arbitrated and ordered the plaintiff to pay Kshs.4,020 but failed to pay. The Village elder decided that 8.5 acres to be given back to the deceased and the plaintiff remained with 11.5 acres. In the 1980's the plaintiff sold five acres to one Peter Keya and remained with 16.5 acres.

The land is agricultural but there is no consent of the Land Control Board. The plaintiff sold 3 acres and remained with 3.5 acres. Though the plaintiff was awarded 31 acres by the Land Disputes Tribunal, the High Court quashed the decision of the Land Disputes Tribunal vide Judicial Review under the Application No.12 of 2013. The defendants admit that the plaintiff is in exclusive use of 3.5 acres but add that the plaintiff has no interest of 20 acres in L. R. NO.5593.

When the matter came for hearing, the ***Plaintiff testified*** that the suit parcel of land was scheduled for auction and produced the notice of sale dated 17/6/1976. He deposited money thus Kshs.18,900 in the accounts of the deceased in the Settlement Fund Trustee and the deceased was given a receipt.

They signed an agreement in the advocates firm of Barbara Tanui whereby the deceased agreed to sell the land at Kshs.700 per acre. However, when they went to the D. O.'s office to do the transfer, he declined to appear. He was called by the District Officer and agreed to transfer the land at Kshs.900 per acre. The Plaintiff paid Kshs.18,000. The agreement is dated 29<sup>th</sup> June, 1976.

The deceased was asked to write the letter of surrender to the Commissioner of Lands. The parties made an application for consent to the Commissioner of Lands signed by both seller and Purchase.

The sale was for a share equivalent to 20 acres. The consent was granted by the Land Control Board Soy/Turbo.

He obtained the award of the Land Disputes Tribunal and giving him the land but the same was nullified by the High Court. He entered the land in 1976 until now. He has never left the parcel and has never been dispossessed. He lives in 20 acres.

On cross examination by Mr. Birech, he states that he did the agreement with the deceased which shows that he bought 20 acres. He paid Kshs.18,900 but his receipts show that he paid Kshs.12,471.

He was paying for 40 acres he abandoned his claim for 40 acres and settled on 31 acres. However, he is in possession of 20 acres.

He states on cross-examination by Mr. Birech that he sold 8 acres to different persons, however, 3 acres were sold back to him. He reiterates that he is in possession of 20 acres.

On re-examination by Mr. Magut, he states he paid Kshs.18,900.

**PW2, Kipsergera Arap Seroney** adopted his statement whose gist is that the plaintiff paid the outstanding Settlement Fund Trustees loan of Kshs.18,000 on behalf of the deceased in the year 1976. He further paid the auctioneers fees of kshs.800.

On cross-examination, he states that in 1976, he went to Nairobi with the Plaintiff and 3 other people and were told that the land was to be sold by auction. The Plaintiff paid the money totalling to Kshs. 8,000. The auctioneers were paid Kshs.900/=and agreed to stop the auction.

**PW3, Philemon Kibiego Tarus** states that Mr. Morogo deceased sold 20 acres to the plaintiff in 1976 and the plaintiff took immediate possession. The Plaintiff has never been evicted from the land.

On cross-examination by Mr. Birech, he states that the deceased complained that the Plaintiff wanted 20 acres and yet he has not paid Kshs.7000 and therefore he would give 11 acres only. It was agreed that the Plaintiff pays the money. He does not know the acreage of land the Plaintiff is occupying.

The Plaintiff engaged Priceline Surveyors who found that the parcel of land occupied by the plaintiff was 16 acres as measured on the ground. The surveyor report was signed by Silas K. Tumo.

DW1, Dickson Kiptoo Morogo, the son of the Deceased states that the Plaintiff agreed with his father when he was young and therefore he did not witness the agreements. In 1988, he was in form one. He came to know of the dispute when he was in form one. The deceased sold land to the Plaintiff but he did not pay all the purchase price. He failed to pay Kshs.7,620. The elders reduced the land into 8.5 acres from 20 acres and therefore remained with 11.5 acres.

He later sold 5 acres to Peter Mahinda and 3 acres to some people that he does not know. During land division, he destroyed the property of the two and took more acres hence all totaling to 16.5 acres which he is occupying to-date.

On cross-examination by Mr. Magut, he states that he was born in 1965. He knew the Plaintiff in 1980. In 1976, he was 11 years. He knows that the Plaintiff bought land in 1980. He knows that the Plaintiff paid the loan owned to Settlement Funds Trustee by the deceased. The Plaintiff bought 20 acres of land. the land was reduced to 11 acres by the village Elders and later the 3 acres. In 1992, there were clashes and he became the care taker For Peter Keya and Maurice Shimoli.

The Plaintiff has been on the land since 1992. He states that he does not know issues of Peter Keya very well and does not know the import t of most of the documents.

On re-examination by Birech, he states that the Plaintiff's land after sale was 20 acres, but some did not pay for it all.

DW2, Jonathan Masika Mutoro a resident of Turbo states that he is a retired Senior Assistant Chief. He became an Assistant Chief in 1992 and a Senior Assistant Chief in 1998. He knows the Plaintiff and the deceased and their case. He went to the deceased land in 1992 to establish, he status after land clashes. He found that the Plaintiff was occupying 11 ½ acres. He had sold 8 acres of land to other persons and remained with 3 ½ acres. The land was sold to Peter Keya and Maurice Shipwoni who were displaced during land clashes by the Plaintiff himself.

On cross-examination by Mr. Magut, he states that he does not know that the land was to be sold by Public Auction. The land was occupied by more than 20 people. He did not have evidence of any survey.

The Defendant produced a report by Geo space surveyors signed by Harun Mwangi whose import is that the parcel of land under dispute in part of LR No.5593. As per the survey data, the area of the Plaintiff was correctly determined as 16.1. acres.

The gravamen of the Plaintiffs submission is that he has acquired the land by virtue of adverse possession and he is entitled to be registered as such as he has been in exclusive, open, peaceful, continuous and uninterrupted, occupation, possession and use of a portion of that parcel of land known as LR.No.5593 measuring 20 acres for over 12 years.

The defendant submits that there is no dispute that the deceased is the registered proprietor of L.R. No.5593. The Plaintiff and the deceased entered into agreement of sale for 20 acres but he did not pay the purchase price fully and only paid for land worth 11.5 acres. He was ordered to pay Kshs.4,020 equivalent to 8.4 acres but failed to do so.

The defendant argues that the land in disputes is agricultural land hence need for the consent of the Land Control Board's. Transfer was to be executed as soon as possible. The agreement was duly executed by both parties.

Prior, to the agreement the property had been slated for sale by Public Auction to recover a debt owed to Settlement Fund Trustee. The notice of sale had been given in the Daily Nation of 25<sup>th</sup> June, 1975.

On 17<sup>th</sup> June 1976, the Director of Settlement wrote to the deceased informing him that the sale would be undertaken on 30<sup>th</sup> July, 1976. The plaintiff decided to salvage the property from auction by paying the money vide the agreement dated 29/6/1976.

The defendant argues that the Plaintiff has not been in exclusive, open peaceful, continuous and interrupted occupation of the suit land. This is because the land has been subdivided and sold to Peter Keya, Maurice Shipwoni Matekwa. The Plaintiff occupied a big parcel of land after land clashes.

I have considered pleadings, evidence on record and rival submissions of both counsel and do find that the Plaintiff and deceased entered into agreement of sale on 29/6/1976 in respect of a portion of 20 acres the consideration for sale of for sale of the portion was kshs.18,000/= which was paid. The Plaintiff was to be given vacant possession of the land.

The property in disputes had been scheduled for sale by auction by the settlement fund trustees.

On the 22<sup>nd</sup> July 1976, the Director of Settlement wrote to the deceased informing him that the land would not be sold due to the payment. This payment was made by the plaintiff due to the fact that the defendants father was unable to pay and was assisted by the plaintiff to offset the loan and therefore salvaging the property.

The application for consent signed by both parties but undated was in respect of sale of one share equivalent to 20 acres.

Consent granted on 20<sup>th</sup> December, 2007 was in respect of an undated application in respect of subdivision of 122 acres into 14 portions of 31,4,5,12,4.5,20,10,9,9,2.5,4.5,2,114,9 8, 5 acres respectively. No transfers were effected.

The surveyors' reports produced in court shows that the Plaintiff is occupying 16.1 acres and 16.3 acres respectively.

After considering the above facts and evidence of the witnesses, I do find the Plaintiff's testimony is challenged as he is not in possession of 20 acres. However, it is evident that he is in possession of 16 acres as stated by the surveyor and has been in possession since 1976. Peter Keya and Maurice Shibwoni were not called as witnesses and were not enjoined as parties and have not come to court to claim the land in dispute.

The evidence on record shows that the Plaintiff took possession in 1976 and until, 2014 there was no interruption and no suit had been filed in court to dispossess him. The proceedings of the Uasin-Gishu dispute Tribunal that were commenced in the year 2007 and the Judicial Review Application No. H.C.M.A. No. 1 of 2008 that became E&L Judicial Review No. 12 of 2013 did not amount to dispossession. In any event, the proceedings were commenced by the Plaintiff who was yearning to get title to the property.

In answer to the Plaintiff's question, this court finds that:

***a) The plaintiff has been in exclusive, open, peaceful continuous and uninterrupted occupation, possession and use of a portion of that parcel of land known as L.R. No. 5593 measuring 20 acres for a period of over 12 years (in fact over 38 years) as of right and has acquired title and ownership of the said parcel by virtue of adverse possession;***

***b) A declaration is made that upon expiry of twelve (12) years from the year 1976 the Title of the Respondents on behalf of the estate of the late KAPTICH MOROGO to a portion of the land parcel known as L.R. No. 5593 measuring 16 acres became extinguished at law and that the defendants only hold the Title in trust for the plaintiff;***

***c) A declaration is hereby issued that the Defendants' Title to the said portion of the aforesaid parcel of land be AND IS HEREBY cancelled forthwith and an order is issued that the land be subdivided and 16 acres be transferred to the plaintiff.***

***d) The defendants to bear the costs of the suit.***

Orders accordingly.

**Dated and delivered this 10<sup>th</sup> day of September, 2019.**

**A. OMBWAYO**

**JUDGE**