



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L NO. 368 OF 2017

ISAAC KIPROTICH KIPTOO.....APPLICANT

VERSUS

EDWARD KIBET KIMETTO.....RESPONDENT

JUDGMENT

By an Originating Summons dated 23rd November 2017 the Applicant sued the Respondent seeking for the determination the following issues;

- a) Whether the applicant has acquired title to the leasehold property known as UASIN GISHU/MILE THIRTEEN/203
- b) Whether the respondent holds the title of the suit land in trust for the applicant
- c) Whether the title of the respondent was extinguished on the expiry of 12 years after the applicant took possession thereof.

Applicant's Case.

The respondent was served with the summons but failed to file a response within the stipulated time therefore the matter proceeded by way of formal proof. PW1 gave evidence and stated that he purchased the suit land from the respondent vide a sale agreement dated 13th January 2004. He stated that it was a term of the agreement that the respondent would sell the suit property to the applicant for a consideration of kshs. 1,000,000/- where he paid Kshs. 500,000/- on execution and the balance was to be paid to A FC to clear a loan owed by the respondent.

It was his evidence that he took possession of the suit property and has been in possession for 15 years. He therefore urged the court to declare that he has acquired the suit land by way of adverse possession. The applicant in support of his case produced a copy of the sale agreement, a copy of official search certificate and a copy of a title deed registered in the respondent's name.

Applicant's Submissions

Counsel gave a brief background to the case and submitted on the ingredients of adverse possession as was discussed in Court of Appeal case of *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR.

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for accusation period, in Kenya, is twelve(12) years. The process springs into action essentially by default or in a action of the owner. The essential pre requisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity in publicity and in the extent to show that possession is adverse to the title of the owner”.

Counsel therefore submitted that the applicant has proved the ingredients of adverse possession and should be granted the orders as prayed in the originating Summons.

Analysis and Determination

This matter proceeded by way of formal proof as the respondent was served with the summons but did not file any response. The issue for determination is whether the applicant has acquired the suit property by way of adverse possession.

The ingredients to be established in a case of adverse possession are well settled as highlighted in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR.

The applicant stated that he has in possession of the suit land for a period of more than 15 years which is beyond the threshold of adverse possession as per section 7 of the Limitations of Actions Act.

In the case of the case of **Virginia Waniiku Mwangi v David Mwangi Jotham Kamau** (2013/eKLR Justice Ombwayo stated that:-

"The Applicants claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession must prove possession of the land exclusively and openly as of right and without interruption for a period of 12 years, Adverse possession requires basic conditions being met to perfect the title of the adverse part'

(a) Open and notorious use of the property: For this condition to be met the adverse part)' use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

Further in the case of **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR** the court held that;

“ It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

This being a claim for Adverse Possession, the applicants 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.”

The applicant must prove that his possession is peaceful, open and continuous. The respondent has not disputed that the applicant has been in occupation of the suit land for a period of more than 15 years which was quiet and continuous without any interruption.

Further, the applicant must prove that the possession was not through force or in secrecy, and without the authority of the owner. The applicant produced a sale agreement between himself and the respondent executed by both parties. There has been no evidence produced to rebut this evidence or to challenge the validity of the sale agreement. It is therefore clear that the applicant has satisfied the ingredients of the doctrine of adverse possession. The respondent's title to the suit land has therefore been extinguished by the operation of the law and should be registered in the name of the applicant. I therefore enter judgment as prayed plus costs to the applicant in the following terms.

- a) An order is hereby issued that the applicant has acquired title to UASIN GISHU/MILE THIRTEEN/203 by adverse possession.
- b) An order is hereby issued that the respondent do sign all the relevant documents to effect transfer to the Applicant failure of which the Deputy Registrar to sign on his behalf.
- c) Costs of the suit to the applicant.

DATED and DELIVERED at ELDORET this 6TH DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr. Korir and in the absence of the defendant.

Mr.Mwelem – Court Assistant