



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 188 OF 2017

(formerly Machakos HCCC No. 114 of 2012 'OS')

MICHAEL OLE DIKIRR.....PLAINTIFF

VERSUS

TANANKO OLE KWENA.....1ST DEFENDANT

MOTONKA OLE NKOTIKO.....2ND DEFENDANT

TIPATEL OLE NTIMERI.....3RD DEFENDANT

PETER MOLINKE SEMEYIAN.....4TH DEFENDANT

JUDGEMENT

By an Originating Summons dated the 11th April, 2012 and filed on 12th April, 2012, the Plaintiff prays for judgement against the defendants in the following terms:

- a. A declaration be made that the Defendants title (if any, which is denied) to at least five (5) acres or thereabout of the land known as title No. KAJIADO/OLCHORO ONYORE/746 has been extinguished by reasons of adverse possession under section 7 of the Limitation of Actions Act Cap. 22.
- b. An order be made vesting and registering part of land know as title No. KAJIADO/OLCHORO ONYORE/746 in the Plaintiff's name as the owner since he took possession thereof in September 1981 as adverse possessor.
- c. The costs of this suit be awarded to the Plaintiff.
- d. Any such further and other orders as the Honourable Court may deem just and expedient to grant.

All the Defendants were served with summons to enter appearance on 13th April, 2012 but never entered appearance nor filed their Replying Affidavits. Interlocutory judgement was entered against the Defendants on 8th July, 2012 and the matter proceeded for formal proof on 2nd November, 2017.

Plaintiff's Evidence

Plaintiff as PW1 stated that he resides in Kiserian and is a farmer. He claimed the 1st Defendant who is an old man sold him five (5) acres from land parcel number KAJIADO/OLCHORO ONYORE/ 56 but after subdivision, his parcel became KAJIADO/OLCHORO ONYORE/ 746 which is the suit land herein. He stated that the 2nd Defendant, 3rd and 4th Defendants are brothers to the 1st Defendant. He contends that he bought the land in 1981 and they went to the firm of messrs Salim Dhanji & Company Advocates where they executed a Sale Agreement. He produced the Sale Agreement as exhibit '1'. He confirmed that he was buying the land at Kshs. 5000 per acres and paid a total of Kshs. 25,000 that was the purchase price in full. Further that they went to the Land Control Board and they were given consent to subdivide. He produced the Consent from the Land Control Board as exhibit '2'. Further that they subdivided the land and he was given the five (5) acres, with the 1st Defendant signing a Transfer form which he produced as exhibit '3'. He contended that the transfer was not effected at the Land's Office as the file disappeared but the vendor was his friend and allowed him to take possession. He has constructed a house and undertakes farming since 1981 to date. He grows food crops, keeps livestock and burns charcoal. He reiterates that the 1st Defendant has never told him to move from the land but he does not have a title to it. He heard a rumour that the 1st Defendant was trying to sell the land and on undertaking a Search at the Land Registry, he discovered the same had been transferred to the 2nd, 3rd and 4th Defendants respectively. He further contends that the 2nd, 3rd and 4th Defendants have never been to his land. He reaffirms that beacons were placed on the land at the time of subdivision and that he has occupied the land with no interference from anybody. The Plaintiff closed his case and filed submissions on 1st December, 2017 which I have considered.

Analysis and Determination

After perusal of the pleadings filed herein including the list of documents and upon hearing the testimony of PW1, I find that the following are the issues for determination:

- Whether the Plaintiff has been occupation of the suit land from 1981.
- Whether the Plaintiff is entitled to orders of adverse possession
- Whether the Land Registrar Kajiado North should be compelled to register Plaintiff as owner of the suit land
- Who should bear the Costs of the suit

The Law on Adverse possession is now well settled.

Adverse possession is described as a process by which a person can acquire title to someone else's land after continuously occupying the said land, in a way that is not consistent with the owner's rights.

Section 38 (1) and (2) Limitation of Actions Act gives the right to a person claiming to be entitled to someone else's land by way of adverse possession to seek the remedy in court by stipulating as follows:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

Order 37 Rule 7 of the Civil Procedure Rules prescribes the procedure on how an application for adverse possession should commence and states that '**Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons and the summons shall be supported by an affidavit to which a certified extract of the title of the land in question has been annexed**'.

For adverse possession, to mature into title to land the following conditions must be fulfilled:

- (1) The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- (2) The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- (3) The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- (4) The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.
- (5) The possession has to be *Exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

For a party to succeed in summons for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in court evidence to prove that the suit land where he/she is claiming adverse possession indeed belongs to the Defendant.

In the instant case, the Plaintiff claims to have purchased the suit land in 1981 and produced the Sale Agreement as exhibit '1'. The Plaintiff obtained the consent of land control board to transfer the suit land and even filled in transfer forms but this was not registered because the file disappeared at the Land Registry. A subdivision was undertaken and he took possession of the suit land where he has resided openly and notoriously since 1981 where he undertakes farming and burns charcoal. He has discovered the 1st Defendant has now registered the suit land in the name of the 2nd, 3rd and 4th Defendants respectively, I note the Plaintiff has been openly living on the suit land and there is no evidence provided to prove there was an attempt to evict him at any time. If the period from 1981 is computed, it amounts to thirty seven (37) years which is above the legal requirement of twelve (12) years for one to prove adverse possession.

The Plaintiff did not attach a copy of the title deed but a copy of the Certificate of Official Search of the suit land to the supporting affidavit of the Originating Summons. I note from the Search that the 2nd, 3rd and 4th Defendants were registered as owners of the suit land on 27th May, 1990 when the Plaintiff was already residing thereon. I find that the Plaintiff fulfilled the provisions of Order 37 Rule 7 of the Civil Procedure Rules that requires an extract of title to be attached to the affidavit at the time of filing the suit.

In the case of **Daniel Kimani Ruchine & Others versus Swift Lotherford & Co. Ltd and Anor (1977) eKLR** the court held that ' **The Plaintiffs have to prove that they used the land as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion)**'.

Professor Tom Ojienda's Principles of Conveyancing Hand Book, Law Africa Vol II at page 97 clarifies this position further when the author stated as follows:

"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse."

The Plaintiff's occupation of the suit parcel of land has been open, continuous, and uninterrupted. He has been cultivating the suit land and established his homestead thereon. I find that he has fulfilled the requirements of granting adverse possession as held in the case of *Wambugu Versus Njuguna 1983 KLR 174* cited in *Karuntimi Raiji Vs. M'makinya (2013) eKLR*, where the court of appeal held that 'in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either 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 suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.'

It is against the foregoing that, I find and hold that the Plaintiff has proved his case on a balance of probabilities that his right of action as against the Defendants for adverse possession over the suit land had accrued as at the time of filing this suit. Further that in so far as the 1st Defendant transferred the suit land to the 2nd, 3rd and 4th Defendants, this cannot defeat the Plaintiff's claim as espoused in section 38 (1) of the Limitation of Actions Act.

It is in these circumstances and for the reasons I have given above, that I allow the Plaintiff's Originating Summons dated 11th April, 2012 and filed on 12th April, 2012, with costs.

I further make the following orders:

The District Land Registrar Kajiado North be and is hereby ordered to register the Plaintiff as the owner of land parcel number KAJIADO/OLCHORO ONYORE/746

Dated and Delivered in Kajiado this 7th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Parties absent