



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 221 OF 2013 (OS)

MARGARET MONYANI.....PLAINTIFF

VERSUS

AGNES NALIAKA WANAMBISI.....DEFENDANT

JUDGMENT

By originating summons amended on 17.6.2014 pursuant to the leave of the court granted on 29.7.2013 and the subsequent orders of 4.6.2014 extending and or enlarging time limited by the order of the court of 29.7.2013 within which to file an amended originating summons, the plaintiff claimed that he was entitled to land measuring $\frac{1}{4}$ of an acre initially known as Soy/Soy(Navillus) Block 59 now Soy/Soy Block 10 (Navillus)/1923 by adverse possession and prayed for determination of the following issues:

- 1. Whether or not the applicant has been in occupation, possession and use of quarter ($\frac{1}{4}$) of an acre of land parcel initially known as Soy/Soy (Navillus) Block 59 and now known as Soy/Soy Block 10(Navillus)/1923 since 1997 and whether the rights of the respondent have been extinguished by effluxion of time.**
- 2. Whether the said possession, use and occupation has been peaceful, open, adverse to the respondent's rights and uninterrupted until November, 2009.**
- 3. Whether the applicant should be declared the owner of the said quarter ($\frac{1}{4}$) of an acre of land parcel initially known as Soy/Soy(Navillus) Block 59 now Soy/Soy Block 10 (Navillus)/1923 by adverse possession and upon survey, the said portion of land be registered in the applicant's name and the applicant be issued with title deed.**
- 4. Where the respondent obtained title to the quarter ($\frac{1}{4}$) of an acre of land parcel initially known as Soy/Soy(Navillus) Block 59 now Soy/Soy Block 10 (Navillus)/1923 illegally and/or fraudulently.**

The plaintiff in the originating summons in paragraph (iv) alleges that the title was obtained fraudulently and particulars of fraud as:

- 1. Causing and/or perpetrating the issue of the title deed knowing fully well that the applicant had an interest in the said parcel of land.**
- 2. Causing and/or perpetrating the issue of the title deed while knowing that the applicant was in occupation of the said piece of land and had fenced the same and built a house.**
- 3. Causing and/or obtaining the title deed well knowing that she (the respondent) was not entitled to the said piece of land.**
- 4. Wrongfully misrepresenting herself to the Land Control Board as the owner/occupant of the said piece of land.**
- 5. Wrongfully misrepresenting herself that she was the allottee of the said piece of land.**
- 6. Who should pay the costs of the proceedings?**

In the supporting affidavit, she states that on or about 1997 she took possession and started using a quarter ($\frac{1}{4}$) of an acre of land parcel initially known as SOY/SOY NAVILLUS/BLOCK 59 and now known as SOY/SOY BLOCK 10(NAVILLUS)/1923 upon getting authority from ISHIEYWE SELF HELP GROUP who were then the proprietors of the said parcel of land. Upon entry on the said parcel of land, she developed interest in the portion of land she had been given by Ishieywe Self Help Group and wished to purchase that ($\frac{1}{4}$) of an acre. That she made payments and completed the purchase process and she was issued with a share certificate No. 045 and a shareholder Identification Card No. 1647B which identifies her as the registered proprietor of the said land parcel.

That on or about 1997, the officials of Ishieywe Self Help Group showed her the land parcel and its boundaries before she entered the same and commenced use thereof whereby she fenced it off and constructed a house thereon in which she lives to date. The Respondent has never been in occupation of the said land parcel. That ever since 1997, she has been living and cultivating the said quarter (1/4) of an acre of land every year and she has been in possession thereof. That in or about the year 2009, she discovered that the Respondent had fraudulently and illegally obtained Title Deed to the said parcel of land initially known as SOKY/SOY NAVILLUS/BLOCK 59 and now known as SOY/SOY BLOCK 10 (NAVILLUS)1923 which she still occupies.

The share certificate No. 045 (included in the bundle of documents marked "MM1") giving her ownership of the parcel of land initially known as SOY/SOY(NAVILLU)BLOCK 59 and now known as SOY/SOY BLOCK 10 (NAVILLUS)/1923 was signed by the Chairman of Ishieywe Self Help Group, Clement Ouko Odhiambo, the secretary Francis Juma Taabu and the Treasurer Hannington Ellys Oriedo on the 24th July, 1999).

That the above-mentioned persons, the Chairman, Secretary and Treasurer of Ishieywe Self Help Group also obtained a letter of consent from the Land Control Board dated 18.10.2007 giving consent to transfer the land to the Respondent against her interest and/or occupation.

The action by the aforesaid officials of Ishieywe Self Help Group amounts to fraud as they are the very individuals and/or officials are the ones who granted her authority to enter the subject land and issued her with a signed certificate No. 045 for ownership of the parcel of land initially known as 59 and now known as SOY/SOY BLOCK 10 (NAVILLUS)1923. The Defendant/Respondent holds Title Deed to the suit land and yet as at the time she allegedly got Title Deed in 2009 she had already taken possession and she was the owner of the subject property. The Respondent obtained title to the quarter (1/4) of an acre of land parcel initially known as SOY/SOY BLOCK IO(NAVILLUS)/59 and now known as SOY/SOY BLOCK IO(NAVILLUS)/1923 illegally and/or fraudulently. The plaintiff has Particularized Fraud by the Defendant/Respondent as follows:

- a. Causing and/or perpetrating the issue of the title deed knowing fully well that the Applicant had an interest in the said parcel of land.**
- b. Causing and/or perpetrating the issue of the title deed while knowing that the Plaintiff/Applicant was in occupation of the said piece of land and had fenced the same and built a house.**
- c. Causing and/or obtaining the title deed well knowing that she (the Defendant/Respondent) was not entitled to the said piece of land.**
- d. Wrongfully misrepresenting herself to the Land Control board as the owner/occupant of the said piece of land.**
- e. Wrongfully misrepresenting herself that she was the allottee of the said piece of land.**

The plaintiff claims that though the Respondent has obtained a Title deed to the said property, and is now registered as the owner, the Respondent has not brought any proceedings to remove her and have acquiesced to her occupation which has been peaceful, uninterrupted, open and adverse to the interests of the Respondent. That since she purchased the said piece of land, she has made tireless effort to have the land parcel registered in her name but her efforts have been frustrated by the officials of ISHIEYWE SELF HELP GROUP as they cannot be found.

That though initially she entered into the land as purchaser, the sale was not concluded as transfer was not done in her favour and thus her claim to the land is by virtue of adverse possession.

The plaintiff has been advised by Mr. A. K. Nyairo, Advocate which information she verily believes to be true that under the Limitation of Actions Act, Cap 22, Laws of Kenya a claim to land by a registered proprietor becomes extinguished upon expiry of 12 years from the date another person took possession of the land and the land vests in the other person who has been in peaceful, open, and uninterrupted occupation of the suit land.

The twelve (12) years have since expired hence her claim for adverse possession and the Respondent's rights to the parcel of land she occupies were extinguished at the end of the 12 years and she is entitled to be declared and registered as the owner of the said quarter (1/4) of an acre of land. That she has done developments on the parcel of land including construction of a house wherein she lives.

The Respondent has now threatened to forcefully take possession of the said property, destroy and/or demolish her house and has even started depositing construction material on site and she stands to suffer irreparably if the respondent makes good the said threat.

In the replying affidavit, the respondent states that first and foremost, the originating summons is premature as the applicant's occupation if any and which is denied is less than 12 years.

The said originating summons is defective for noncompliance of the mandatory provisions of Order XXXVI, Rule 3 (D).

The respondent states that at the time the applicant purported to take possession of land parcel No. SOY/SOY BLOCK 10 (NAVILLUS)/1923, the same was not in existence hence adverse possession against her start running from the time she did obtain a title which was on 25th November, 2008. The applicant stands to suffer nothing as she has without her consent entered her land parcel which basically is illegal.

The respondent did pay Ishieywe Self Help Group a total of Kshs. 36,000 as a member for Self Help Group. **That** upon all the payment, she made further payment for the process to obtain the Title deed. That she had earlier been registered as a member of Ishieywe Self Help Group

her membership number being 2153.

Upon completion of payment, she did pay for consent processing fees which she did obtain a consent from the land control board at District Commissioner of Uasin Gishu. That she did not have sufficient money after processing the title deed to start construction. She denies having committed any fraud while processing the title deed as she followed the proper procedure to obtain the title deed for her parcel of and after she had been allocated.

She claims that there are no particulars of fraud pleaded which are mandatory in law. The occupation of the applicant has never been peaceful that is why on 4.8.2008 through the title deed committee they wrote to her informing her that her occupation is illegal. She has been advised by her Advocate on record that this originating summons is incompetent and should be dismissed with costs.

The plaintiff in her evidence states that she was allocated the plot by Eshieywe Self Help Group and started using it in 1997. She paid Kshs.24,000 to Eshieywe Self Help Group. She was a member of Eshieywe Self Help Group and was allocated the land by the group. She has constructed on the land a house, a toilet. The defendant knows that the plaintiff is in occupation. The land in dispute is Block 10 (Navillus)/23. On cross examination, she states that she knows that the defendant has a title deed which she got before 2009.

The plaintiff called Rosalia Ngaiza, a small-scale business lady, who states that she knew the plaintiff in 1979, when they began doing business. She is also a member of Eshieywe Self Help Group. She also has land in the area and that her land and plaintiff's land are 200 metres apart.

The defendant states that she is also a shareholder of Eshieywe Self Help Group. She bought one share for Kshs.24,000. She balloted for the land in dispute. The ballot was issued after paying all the fees. She had someone else staying in the land. She reported to Eshieywe Self Help Group who wrote to the plaintiff informing her that the land belongs to the defendants but the plaintiff did not vacate. The land is currently registered in her name. She produced the certificate of official succession and the consent of the Land Control Board. On cross examination by Mrs. Khayo, she states that when she went to take possession she found someone in possession being the plaintiff. She does not know when the plaintiff took possession.

DW2, Cecilia Martha Njoki, is a Coordinator Kenya National Acquisition of Parents, North Rift region. She states that the plaintiff and defendants are shareholders of Eshieywe Self Help Group. Her responsibility was to keep records. According to her, records the plot belongs to Agnes Naliaka the defendant. She obtained title through the trustees.

The plaintiff submits that she has been in adverse possession of the suit property. She submits that she dispossessed Eshieywe Self Help Group. Moreover, she contradicts herself by stating that the defendants fraudulently got herself registered as the proprietor. For the doctrine of adverse possession to succeed, the dispossessed possession must have a good title.

It is trite law that adverse possession in Kenya applies where the person claiming adverse possession has been in possession for more than 12 years when the owner was registered proprietor of the suit land. In this case, the defendant was registered on 25.11.2008 and therefore, filing this suit on 20.11.2009 barely one year after the defendant was registered proprietor renders the suit a non-status having been filed prematurely.

The principle of adverse possession in Kenya is premised on section 7 of the Law of Limitation Act. The law on adverse possession was succinctly summarized by Hon Justices Makhandia, Ouko and M'noti in Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR.

This doctrine in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which is in these terms: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

The fact the defendant’s proprietary rights had not crystalised when the plaintiff took possession disentitles the plaintiff from a claim of adverse possession. The fact that the claim is also premised on fraud shows a misconception by the plaintiff of her rights. She cannot claim adverse possession on a title that was fraudulently obtained as a claim of adverse possession is an admission that the defendant has good title but has abandoned his rights to the land. The upshot of the above is that the suit is dismissed with costs.

Dated and delivered at Eldoret this 28th day of June, 2018.

A. OMBWAYO

JUDGE