

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L NO. 372 OF 2016

IN THE MATTER OF AN APPLICATION FOR ORDERS UNDER SS. 37 & 38

OF THE LIMITATION OF ACISIONS ACT, CAP 22 LAWS OF KENYA.

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS BASED ON ADVERSE POSSESSION

AND

IN THE MATTER OF THE PARCEL OF LAND KNOWN AS

ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392

BETWEEN

ISAAC KEMEI.....APPLICANT

VERSUS

ANN CHEMWORSIO.....RESPONDENT

JUDGEMENT

By an originating Summons dated 13th December 2016 the applicant herein ISAAC KEMEI the Applicant/Plaintiff herein sued ANNE CHEMWORSIO seeking for an order that he has acquired title to that parcel of land known as ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392 measuring 0.51 Ha or thereabouts by adverse possession. The applicant listed the following issues to be determined by the court:

1. **Whether** the Applicant herein has acquired title to the said parcel of land known as ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392 measuring 0.51Ha or thereabouts by adverse possession
2. **Whether** the Respondent ANNE CHEMWORSIO holds the said title to the parcel of land in trust for the Applicant.
3. **Whether** the title of the respondent in respect of the said parcel of land got extinguished on the expiry of 12 years after the applicant took possession.
4. **Whether** the Respondent should be ordered to execute all such documents of transfer as shall facilitate the transfer of ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392 measuring 0.51 to the applicant
5. **Whether** the respondents should pay the costs of this suit.

The applicant's case was supported by an affidavit which was sworn on the same date as the Originating Summons.

Applicant's Case

The applicant gave evidence and stated that land parcel No. ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392 measuring 0.51 Ha was first registered in August 1993 in the name of KAPYEMIT FARM LIMITED. He further stated that as per the Survey Map, the suit land is located at the northern side, bordering the Applicant's family's land parcel ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/156 of which an access road to the suit land runs along the upper boundary of the Applicant's family land.

It was the applicant's case that prior to the subdivision in 1993 and while the earlier registration L/R NO. 11036 subsisted, the Applicant was already in possession and use of the ground area of land in issue. He further stated that he was born in 1969 and that the suit land is in the name of his deceased father Rongoi Kemei. It was his evidence that he cultivates the plot No. 156 and 392 which plot is registered in the name of the defendant Anne Chemworsio.

The applicant stated that upon subdivision, the suit land was registered as land parcel ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392, in favour of KAPYEMIT FARM LIMITED and that the said company later transferred the same to the respondent in September 2004. He further stated that he continued enjoying use of the newly registered subtitle herein even after the same was transferred to the Respondent.

The Applicant also stated that in early October 2004, the Respondent went to the suit land and informed him that she had acquired the suit land while he was in occupation. He stated that he conducted a search and found out that plot No. 392 had been registered in the Respondent's name. It was his evidence that plot No. 156 and 392 are adjacent to each other and there is a fence dividing the two plots where he has planted blue gum trees along the fence. He also stated that the respondent gave him notice in 2004 to stop cultivating the land. The applicant therefore prayed that the court do declare that he has acquired title over the suit land under the doctrine of adverse possession and should be registered as owner of the suit land.

On cross-examination by Counsel for the respondent he stated that he stays on plot No. 156 which belongs to his deceased father and that he is not an administrator of the estate of his deceased father. He also admitted that he has not built on plot No. 392 and that there was no conflict between him and the respondent as the land was transferred to members by Kapyemit Farm. The applicant also stated that the respondent did not sell the land to him but claiming on the ground that he has been staying on the suit land. He urged the court to grant the orders as prayed in the originating Summons.

Respondent's Case

The Respondent gave evidence and relied on the replying Affidavit and stated that plot No. 392 was given to her husband David Ruto Advocate in lieu of legal fees for service rendered to Kapyemit Farm limited who asked her to register the plot in her name. The respondent further stated that her husband was shown the plot by the officials of Kapyemit Farm. It was further her testimony that the plot that they were shown was plot No. 380 and not 392.

The respondent also stated that she has never been to plot No. 392 and that she has also not developed plot No. 380. She therefore prayed for a declaration that the land belongs to Kapyemit farm limited.

On cross examination by the Counsel for the Applicant, the respondent reiterated her testimony that the land was given to her by her husband David Ruto Advocate in lieu of legal fees but she did not know how much the legal fees was, and did not have a contract for the legal fees. She stated that she was taken to plot No. 380 by her husband in 2006. It was also her evidence that they were taken to the plot by the officials of the company and that she does not know the applicant.

DW2 Shadrack Ruto gave evidence and stated that he was the secretary of Kapyemit farm from 1974 to 1996 and that they bought land and subdivided the same to 416 members . He further stated that the titling process was done and started issuing titles to members in 1993.

It was DW2's evidence that the company was dissolved in 1996 but they continued giving the titles to members who had not gotten. He stated that there were complaints from members who took them to court and they agreed with Birech and Company Advocates that they would give them a plot in lieu of legal fees. He also stated that David Ruto was the lawyer handling the case and was given plot No. 392 but he was shown plot No. 380 which is in the name of the company. DW2 gave evidence that they thought that it was plot No. 392.

It was further DW2's testimony that they have never had any problems with the applicant in respect of the suit land including the late father. That David Ruto Advocate had requested them to transfer the plot in the wife's name. He therefore stated that they would like plot No. 392 to be transferred to the company.

On cross examination by Counsel for the applicant he stated that even though he does not have any documents in court to show that he was the secretary in Kapyemit farm, the members know that he was one. He stated that they did not create extra plots as directors of the company.

DW 2 also stated that plot No. 380 is in the company's name and that he did not have a letter from Birech and Company Advocates in respect of the agreed legal fees but he said that they had agreed at Kshs. 150,000/ He also stated that they used a map to show Ruto the plot No. 380 and not 392 and that the plot was not in anyone's name before they registered it in the respondent's name.

It was further his evidence that the green card shows that it was in the company's name and that they intended to transfer plot No. 380 and that the respondent has no right to claim plot No 392 as she was given 380.

On re-examination DW2 stated that there was no fraud or misrepresentation and that he was on plot No.392 two years ago.

DW3 David Ruto Advocate gave evidence and stated that the respondent is his wife and that he does not know the applicant as he has never seen him. It was his evidence that he worked at the firm of Birech and Co. Advocates whereby he represented the directors of

Kapyemit Farm in case No. 68 of 1993. He stated that they did not have funds so they agreed to give the Firm one acre piece of land in lieu of legal fees.

Mr Ruto stated that at the end of the case he was shown a parcel of land of which he was told that it is plot No 380 on the upper side of the Kitale Eldoret route. He also stated that he was not able to transact immediately but when he went back in 2006 a person who was in the neighboring plot protested.He also stated that they reported the matter to the chief together with the Committee and left the Committee to follow up the matter and later instructed them to register the land in the respondent's name.

It was further DW3's evidence that he contacted the secretary of Kapyemit Farm and informed him that the parcel of land that was registered in the respondent's name was not the parcel that they had been shown. He further stated that he trusted the committee and did not cross check the title number and at no time had he ever visited plot No 392. That parcel No 380 is not currently registered in anybody's name due to the mistaken belief that it was 392.

DW3 also stated that the issue of adverse possession cannot arise in this case as the respondent has never visited plot No. 392 and has never met the applicant. He stated that the land should revert back to Kapyemit Farm as the applicant should not be allowed to use the law ingeniously to get land.

On cross examination by Counsel for the applicant he stated that he did not produce any pleadings or an

agreement of the fees and that there was no dispute that the title was issued in 2004. He stated that DW 2 was one of the officials who took him to see the land. That was the close of the defence case.

Counsel for the Applicant listed the following issues for the Courts determination

- 1) Whether the respondent is the registered owner of the suit land parcel ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392.
- 2) Whether the applicant has been in open, continuous and uninterrupted possession and use of the suit land for a period not less than 12 years.
- 3) Whether the applicant's claim for the suit land has crystalized under the doctrine of Adverse Possession.
- 4) Whether the respondent has raised sufficient grounds to vitiate the applicant's claim
- 5) Who should pay costs of this Summons

On the 1st issue as to whether the respondent is the registered owner of the suit land parcel ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/392, Counsel submitted in the affirmative relying on the white card and certificate of official search which were produced as exhibit I & 2. Counsel further submitted that no evidence was led to demonstrate that her registration was erroneous and further that no explanation was given why the error was never noted as the title was issued 13 years later.

It was Counsel's submission that neither a counter claim has been filed by the respondent nor has the KAPYEMIT FARM LIMITED moved the court or any other forum seeking the recovery of the suit land. He stated that the registration of a party as the proprietor of a subject land is the only proof of ownership recognized under Article 64 of the Constitution and under the relevant Land Acts.

In response to the issue as to whether the applicant has been in open, continuous and uninterrupted possession and use of the suit land for a period not less than 12 years, Counsel submitted that the applicant was in possession when the head title was LR 11036 subsisted.

That when the mother title was subdivided amongst the shareholders and other interests, the suit land parcel MUNICIPALITY BLOCK 20 (KAPYEMIT)/392 was 1st registered in the name of Kapyemit Farm Limited in May 2004, before the same was transferred to the respondent in September 2004 and as such change of proprietorship did not interfere with his possession and use of the suit land herein. Further that the applicant has used the land since the 90s for growing maize crop, planting trees for commercial purposes and grazing his livestock.

Counsel therefore prayed that the court finds that the applicant has been in continuous open and uninterrupted possession and use of the suit land measuring about .25 acres for a period exceeding 12 years and as such the claim for the suit land has crystallized by way of adverse possession.

It was further Counsel's submission that the respondent has not raised any bona vide grounds of objection to the applicant's claim and that she cannot be heard to say that there was an error in the land that was transferred to her. That the respondent's claim over the suit land is statute barred.

Counsel cited the provisions of section 7 of the Limitation of Actions Act which provides that 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.

He also cited Halsbury's Laws of England, 4th Edition volume 1 6(2) at 910 thus:

' A claimant in equity is bound is to prosecute his claim without undue delay. This in pursuance of

the principle which has underlain the statutes of limitation, 'equity aids the vigilant not the indolent' or 'delay defeats

A court of equity refuses its aid to stale demands, where the Claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches').

Counsel cited several cases in support of the applicant's claim for adverse possession and urged the court to grant the orders as prayed with costs to the applicant.

RESPONDENT'S WRITTEN SUBMISSIONS

Counsel for the respondent filed written submission and gave a brief background of the case which I have already enumerated above. It was Counsel's submission the respondent averred that she is the registered owner of the said parcel Eldoret Municipality Block 20 (Kapyemit)/392 and that the respondent denied that the applicant is entitled to the prayers as its not true that he has had uninterrupted use of the land for over Twelve (12) years since the respondent has neither met the applicant nor had knowledge of his claim over the said parcel of land.

Counsel listed the issues to be determined by the court as follows.

Wether the applicant made a physical entry and has been in possession of the suit land for over Twelve (12) years. On this issue Counsel submitted that the applicant has not met this condition as it was the applicant's evidence that he lives on parcel Eldoret Municipality Block 20 (Kapyemit) 156 which is registered in the name of his father Rongoei Kemei (deceased)and which borders the suit land herein parcel Eldoret Municipality/Block 20 (Kapyemit)/392. It was his evidence that he was not the Administrator of the Estate of the deceased hence he has no authority to lay claim in the said parcel.

It was Counsel's submission that the respondent testified that she has never met the applicant and the allegations by the applicant having met the respondent are therefore untrue. It was also the respondent's sworn testimony that she has never been to parcel Eldoret Municipality Block 20(Kapyemit)392 as the same has never been shown to her which evidence was supported by DW2 Shadrack Ruto who was the secretary of Kapyemit Farm that allocated the farm to it's members and to the respondent herein in lieu of the legal fees paid to her husband.

Counsel stated that DW2 explained that he had never shown the said parcel to the respondent but the parcel that was shown to the respondent and her husband was Eldoret Municipality Block 20(Kapyemit) 380 which parcel is located far away from the suit land and the same was corroborated by DW3's evidence.

Counsel therefore submitted that from the evidence above it can be deduced that the land has always been vacant because the respondent, the registered owner has never visited the land and has never been aware of the applicant's occupation. Further that the applicant admitted that he resides and has put up his home which borders the suit land therefore, casting doubt on his allegations that he is in occupation of the suit land.

Counsel cited the case of **Gabriel Mbui vs Mukindia Maranva(1993) ECLR** where the court stated that "Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable"

Miss Tum therefore submitted that the applicant has failed to satisfy the requirement as the respondent has never been in occupation and made aware of the applicant's claim and therefore the claim must fail. Miss Tum further submitted that issues of fraud were not pleaded and were not the issues in contest. In any case, even if the title by the respondent was fraudulently acquired or in doubt as to how it was

acquired, then the doctrine of adverse possession is not maintainable in the instant suit. As it was held in the above cited case of **Ravindranath Dahybai Bhagat vs Hamisi Herod & 5 others (2014) eKLR** where it was held that "One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the suit land. It does not lie in the mouth of the claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession

On the issue whether the applicant's possession is open and in conflict with the title such that it gives the respondent who is the registered owner the right to sue for possession, Counsel submitted that in the instant suit, the registered owner the respondent was not afforded an opportunity to know that her rights had been infringed. This is because she testified and supported by DW2&DW3 that she was not shown the parcel of land in which she is registered. Even if it is alleged by the applicant that they met, he testified that there was no confrontation or conflict with the respondent.

In conclusion Counsel stated that it is clear and apparent that the respondent, though being the registered owner of the property, had never visited the suit parcel Eldoret Municipality Block 21 (Kapyemit)392. The evidence is buttressed by the Respondent's witness DW2 Shadrack Ruto, who gave a chronology of how the respondent acquired the title deed to the said parcel and how she was shown another parcel of land being Eldoret Municipality Block (Kipyemit/380.

She finally submitted that the applicant's claim must fail as the doctrine of adverse possession has not been proved and urged the court to dismiss the applicant's suit with costs to the defendant and in the alternative and without prejudice the suit land revert back to Kapyemit Farm.

Analysis and determination

This is a suit where the applicant wants the court to declare that he has acquired the suit land by way of adverse possession. The law on adverse possession is now settled.

Section 38 of Limitations of Actions Act provides for the doctrine of Adverse Possession. It provides:

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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".

For a person to succeed in a claim of adverse possession then he/she must prove that the possession is inconsistent with the title of the owner and this does not include a scenario of possession under licence from the owner or by way of trust on one's behalf. There must be denial of the owner's title in one form or another for possession to be adverse as was held in the case of (***Mutiso v Mutiso [1998] LLR 3268 (CAK) the Court of Appeal stated as follows;***

".....the appellant in his own affidavit, referred to at the beginning of this judgment, had categorically stated that he had been put into possession and remained on the suit land for a period of about 18 years by the consent and with the knowledge of the respondent and his predecessor. His possession could not therefore be construed to be adverse. Consequently,

time did not begin to run in his favour until the respondent withdrew his consent. The concrete evidence of the withdrawal of the consent was the demand by the respondent that the appellant should stop any further development on the suit land and instead vacate."

In this case the applicant and the respondent have never met and the issue of being put in possession or withdrawal of consent does not arise. There is no denial of the respondent's title in one form or another and therefore adverse possession does not apply.

In **James Mwangi & Others – v- Mukinye Enterprises Ltd., -High Court Civil Case No. 3912 of 1986**, it

was stated that a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years. The applicant stated in his evidence that he stays on plot No Eldoret Municipality Block 20(Kapyemit) /156 but cultivates plot No 392 which is registered in the name of the respondent herein who was registered as such in 2004. The applicant produced photos to show that there are crops and trees planted on the suit plot. The photos alone is not a sure way of confirming whether these crops are on plot No. 156 or 392 as alleged by the applicant. The applicant is the only one who gave evidence and did not call any witness or request for a report for a site visit to ascertain his claim.

The applicant further stated that he has planted blue gum trees along the fence which could be on his side of the plot and not plot No.392. as there was no clear evidence to establish the same. Proof of adverse possession requires clear evidence as this is a doctrine which allows a claimant to be registered an owner of suit land by operation of the law. This gives the claimant a herculean task to establish that he/she should be registered as owner instead of the original owner.

The respondent stated that she has never met the applicant which was corroborated by the evidence of DW3. DW2 who was a secretary of Kapyemit Farm also gave evidence and stated that he had been to the suit land and that there was no occupation. He also confirmed that they had shown the respondent plot No 380 but an error occurred and they registered her name on plot No. 392. Would a party be allowed to benefit from the doctrine of adverse possession where there is an error that is apparent? The respondent does not claim the plot No. 392 that is registered in her name erroneously, she actually states that the plot that she was shown is plot No. 380 and states that the plot should revert back to Kapyemit Farm and not to the applicant.

The applicant also stated that the respondent gave him notice but did not produce this notice to prove the same. Was it a written notice of a verbal one? This is a case where the applicant has seen an empty plot adjacent to his and not seen any one claiming it therefore he wants to grab the opportunity to annexe it to his. Having said that I find that the applicant has not proved that he has acquired the suit plot No 392 by adverse possession and therefore his claim fails with costs to the defendant. The respondent can follow up the matter of rectification of her title with the relevant persons following laid down procedures if she so wishes.

The applicant's case is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 21st day of June 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Miss Tum for the Respondent and Mr. Kiboi holding brief for Mr. Nyekwei for the Applicant.

Mr. Koech – Court Assistant.