



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 913 OF 2012

COLUMBAS NDALA CHEMIATIPLAINTIFF

VERSUS

JOSEPH K. MUTAIDEFENDANT

J U D G M E N T

The plaintiff, **Columbus Ndala Chemiati** came to court against the defendant, Joseph K. Mutai claiming to be the sole absolute registered proprietor of land parcel number **Uasin Gishu/Kimumu Scheme/1481** (hereinafter referred to as the suit property) measuring approximately 0.050 Ha. By virtue of the plaintiff's registration and in the exercise of his proprietorship rights and interests he claims to be entitled to occupy his land without the interference of the defendant. The plaintiff avers that the defendant has trespassed onto the land parcel known as **Uasin Gishu/Kimumu Scheme/1481** and continues to remain in such unlawful occupation to date. The plaintiff prays for an order of eviction against the defendant whether by himself, his servants and/or agents from the land parcel known as **Uasin Gishu/Kimumu Scheme/1481**.

The defendant on his part states that by a sale agreement dated 4.7.1990 between one Vincent Talingo Kiprono as the vendor and the defendant as the purchaser, the defendant bought a portion of land measuring $\frac{1}{4}$ of an acre or thereabout comprised in the parcel of Land known as **Uasin Gishu/Kimumu Settlement Scheme/324**. The defendant further avers that upon sub-division, the plot sold to the defendant was **Designated Uasin Gishu/Kimumu/1481** The defendant further contends that he has had peaceful uninterrupted possession of the suit premises for a period of over 12 years now and that any claim by the plaintiff, if any, has been extinguished by operation of law. It is the further contention by the defendant that he has acquired ownership over the suit premises by virtue of purchase and / or adverse possession and that his occupation / possession of the suit premises does not in any event constitute trespass. The defendant avers that under the circumstances, plaintiff's prayers in the plaint cannot issue.

The defendant further contends that the plaintiff's suit is bad in law as is fatally defective and a preliminary objection shall be taken before the commencement of this hearing of suit to have the suit struck off with costs however the preliminary objection was abandoned.

When the matter came up for hearing, Mr. **Agustus Kimutai Cheruiyot** testified that he was a donee of Power of Attorney in respect of the plaintiff; Mr. Columbus Ndala Chemiati, who suffered stroke. He states that the suit land belongs to the plaintiff who is his father having bought it from Vincent Talingo Kiprono in 1999. He produced the sale agreement and the letter of consent of the Land Control Board. He produced the transfer and the receipt for transfer and claimed to have been paying rates. He produced the original title deed and certificate of official search which title deed is in the name of the plaintiff. He claims that his father entered the land and fenced the same. However, his father does not live on the land. He admits that Joseph Kiprono Mutai the defendant herein stays on the land but states that he entered the land after uprooting the fence in the year 2000. The plaintiff has been unable to evict the defendant even with the help of the chief. Mr. **Agustus Kimutai Cheruiyot** testified that the defendant trespassed in the month of November 2000. He obtained a letter from the Advocate on 8.11.2000 requiring the defendant to vacate. The defendant has not vacated the land to date. He prays for Judgment in terms of an order of eviction.

On cross examination by Mutei, learned counsel for the defendant, Agustus Kimutai states that he has never stayed in Kimumu Area and does not know exactly when the defendant entered the land. The seller relocated after selling the land to the plaintiff.

PW2, Vincent Talingo Kiprono states that he is the resident of Kerio and that he acquired the suit land in 1973. He knows Columbus Chemiati the plaintiff because he sold him the suit land in 1999 for Kshs. 70,000/= . He went to Land Control Board and obtained consent as required by law. He signed the transfer form, his wife agreed that the land be sold to the plaintiff. He has sold the land to one person only, namely the plaintiff and not the defendant. He states that he did not sign the transfer. On cross examination, he states that he sold the defendant's father $\frac{1}{4}$ of parcel No. Uasin Gishu/Kimumu Scheme/324 And Not Uasin Gishu/Kimumu Scheme/1481.

PW3 is Vincent Maiyo knows the parties herein as the plaintiff was the buyer whereas the seller was Talingo Kiprono. Kiprono Arap Chumo the defendants father was in occupation of a different part of land. The plaintiff bought the land first but never lived on the land. Kiprono Arap Chumo the defendant's father died and was buried on the land. However, he was in occupation of a different portion. The defendant moved from their portion to the plaintiff's portion. Vincent Maiyo states that he was the author the agreement for the plaintiff and

Vincent Talingo.

The defendant (**DW1**); Joseph Kiplagat Kimutai, a resident of Kimumu states that he is a business man and owns a hotel at Chepkoilel junction. He knew the plaintiff when he came to court. His father amongst 8 purchasers bought the land from Vincent Talingo Kiprono in 1990 and that subdivision was done in 1998. He produced an agreement dated 4.7.1990. They went to the board and consent for subdivision was given to Vincent Talingo. When they did a search in 2000, they found that the said the land had been registered in the name of Columbus Ndala Chemiati. The defendant claims that he has been in the land since 1990 and does not know the plaintiff. He does not know how the plaintiff got title. He prays that title be cancelled.

On cross examination by Mr. Musundi, he confirmed that the land was bought by his father, Chumo Arap Rono but does not have any grant of succession. He does not have a power of Attorney. He states that he has lived in the land since the year 1990.

DW2 is Thomas Matangi, a businessman and a farmer who lives in Kimumu and the defendant's immediate neighbour, states that the defendant's father bought the land in dispute in 1990.

At the close of the defendant's case parties filed submission. The plaintiff submits. The plaintiff submits that he is the registered proprietor of the suit land. That he was duly and lawfully registered as the proprietor of the suit land. He refers to section 30 of the Registered Land Act Cap 300 Laws of Kenya(repealed) and sections 25 and 26(1) of the Land Registration Act 2012 that give him the rights and privileges of the property as the absolute registered proprietor.

The plaintiff further submits that the defendant is a trespasser on the land parcel known as Uasin Gishu/Kimumu Scheme/1481. He is not the registered owner and therefore he is a trespasser.

The plaintiff refers to section 25(1) of the Land Registration Act 2012 which provides that: -

The plaintiff submits that the defendant does not hold a valid purchasers interest in the land parcel known as Uasin Gishu/Kimumu/1481. Moreover, that the sale agreement names show Arap Rono as the purchaser. Moreover, that the transaction agreement is in respect of plot no. 324 and the suit land.

Moreover, it is argued that there was no consent of the Land Control Board as required by law.

On the issue of adverse possession, the plaintiff submits that the suit was filed within 12 years and therefore adverse possession does not apply.

The defendant on his part submits that his father bought the land in 1990 and immediately gave it to the defendant for occupation. The defendant has been in occupation since 1990. The occupation has been continuous, open and exclusive. The registered owner has not been in occupation. The plaintiff did not ascertain the person in occupation before processing title. The defendant was already in occupation when title was processed. The defendant's father died on the land and was buried on the land. The defendant argues that the provision of section 7 of the limitation of Act bars a party from claiming land after lapse of 7 years.

I have considered the pleadings and the evidence on record and the submission of counsel and do find that parcel of land No. Uasin Gishu/Kimumu Scheme/1481 is registered in the name of Columbus Ndala Chemiati. He was registered as the proprietor on the 21.6.1999 after a process that started on 8.3.1999 by an agreement of sale between himself and Vincent Talingo Kiprono. The agreed price was Kshs.70,000/= which was paid in full. Vincent Talingo Kiprono applied for Consent of Eldoret Municipality Land Control Board on the 8.3.1999 and obtained the same on the 3.6.1999. The title deed was issued on the 21.6.1999. The plaintiff did not take possession immediately as he was residing in another parcel of land at Kidiwa.

I have also carefully considered the evidence on record by the defendant and do find that the defendant's father entered into agreement with Vincent Talingo Rono the same person who sold the plaintiff land for the sale of ¼ of an acre of plot No. Kimumu Settlement Scheme/324. The consent for subdivision was given in respect of plot no. 324. On 22.1.1998 Vincent Talingo Kiprono and Joseph Kiplagat Mutai applied for the consent of the Land Control Board for transfer of parcel number Uasin Gishu Kimumu Settlement Scheme/1481 measuring 0.0050 Ha. On the 22.4.1998, the consent of the Land Control Board was obtained for the transfer. However, no transfer was effected and registered. No title deed was issued.

The first issue to be considered is whether the transactions by the plaintiff's father and the defendant's father were legal processes.

I do find that the plaintiff father followed the legal procedure in obtaining the title and therefore he is legally registered as the proprietor of the land. However, the defendant's process was not conclusive and that the application for consent of the Land Control Board by the defendant and Vincent Talingo dated 22.1.1998 in respect of the agreement made on 4.7.1990 between the defendant's father and Vincent Talingo was a nullity as it was not made within the six months as provided by law and was not between the seller and buyer as the defendant was not the buyer.

Section 6 (1) c of the Land Control Act Rules that: -

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act"

It would appear on the face of it that the plaintiff is the registered proprietor of the suit land. Section 25(1) of the Land Registration Act provides as follows:

25(1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject-

- 1. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- 2. To such liabilities, rights and interests as affect the same and are declared by section 28 not to noting on the register unless the controversy is expressed in the register.**

The Plaintiffs having been registered as proprietors and having been issued with a certificate of lease over title **No. Nairobi/Block 61/69** are in terms of section 26 (1) of the *Registration of Lands Act entitled to the protection of the law.*

26(1)The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except-

- 1. On the grounds of fraud or misrepresentation to which the person is proved to be a party, or**
- 2. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

There is no doubt that the plaintiff is the registered proprietor of the suitland and there is no evidence of fraud or misrepresentation to which the plaintiff was proved to be party and that it has not been demonstrated by the defendant that the title was obtained illegally, unprocedural or through a corrupt scheme.

The second issue is whether the defendant is in adverse possession of the suitland. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwaqandi [2015] eKLR summarized* the Kenyan legal position on the doctrine as being 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 a fresh 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.”

On the issue of adverse possession, this court finds that the defendant took possession in 1990 and time began running against Mr. Vincent Talingo who was the title holder in 1990 but stopped running against Mr. Talingo on 21.6.1999 when the plaintiff became the registered proprietor. Time against started running against the plaintiff on the 21.6.1999 and therefore 12 years from 21.6.1999 lapsed on 11.6.2011 and therefore when the plaintiff filed the suit on 7.11.2012 the claim was already barred by section 7 of the Limitation of Action Act.

It was evident that the defendants started living on the land before 1998 as per the proceedings before the land Registrar, and precisely in the ruling made on 18.10.2012 the Land Registrar found that the defendant had lived in the property for a long period upto 1998 with

documentary evidence being the application to the Land Control Board and consent of the Land Control Board. I do find that even when the plaintiff was processing title the defendant was in occupation and that is the reason the plaintiff did not get vacant possession.

I do find that the plaintiffs claim is barred by section 7 of Limitation of Actions Act cap 22 laws of Kenya and the same is dismissed with costs. The defendant did not counter claim and therefore the prayer for cancellation is equally not allowed. Orders accordingly.

Dated and delivered at Eldoret this 18th day of June, 2018.

A. OMBWAYO

JUDGE