



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 286 OF 2017

FORMERLY KISII ELC NO. 372 OF 2015

MICHAEL LEKAKENY OLE KISASY.....PLAINTIFF

-VERSUS-

JACKSON SERIAN & 3 OTHERS.....DEFENDANTS

JUDGEMENT

By an Originating Summons dated 29th July, 2015 brought under Order 37 rule 7 and 14 of the Civil Procedure Rules and Section 38 of the Limitations of Actions Act the Plaintiff sought for the following orders:-

1. A declaration that the Defendants and in particular, the 4th Defendant's rights to recover a portion measuring 35 acres out of LR No. Trans Mara/Poroko/107, is barred under the Limitation of Actions Act, Chapter 22 of Laws of Kenya and her title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of the suit property for a period exceeding 14 years.
2. There be an order that the Plaintiff be registered as the proprietor of the portion measuring 35 acres out of LR No. Trans Mara/Poroko/107, in place of the 4th defendant.
3. There be an order restraining the Defendants and in particular the 4th defendant, either by herself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the portion measuring 35 acres out of the suit property, that is LR No. Trans Mara/Poroko/107, in any manner whatsoever and/or howsoever.
4. The Deputy Registrar and/or the Executive Officer of the court or such other authorized officer, be directed and/or ordered to execute the Application for consent of land control board, the mutation and the transfer instruments and all other attendant documents, to facilitate the transfer and registration of a portion measuring 35 acres out of LR No. Trans Mara/Poroko/107, in favour of the Plaintiff.
5. Costs of the Originating summons be borne by the Defendant
6. Such further and/or other orders be made as the court may deem and expedient, in the circumstances of this case.

The summons were based on the grounds that the 1st, 2nd and 3rd defendants who were the sons of one Chemoiywa Ole Siriani (now deceased) sold the suit land to the Plaintiff a part of the land measuring 35 acres and they authorized the plaintiff to take possession of the land in 2001 and his possession and occupation of the land has been continuous, open and uninterrupted since 2001 and therefore his interests have become adverse to that of the defendant.

The summons was further supported by the affidavit of the plaintiff in which he deposed that the suit land was sold to him, however, the defendants failed to get the requisite consent to transfer the land from the Land Control Board and despite their failure he took possession of the land and that he has been in an open, uninterrupted and continuous occupation of the land since 2001 and that their title to the land had lapsed.

The summons was opposed by the Respondent who had filed a replying affidavit. The 1st respondent stated that as one of the administrators of the estate of his deceased father he did not deal with the land prior to the confirmation of the grant of letters of administration and that they never sold the alleged 35 acres of land to the plaintiff. He further contended sometimes in 2004 they sold the entire parcel of land to the

4th defendant and that the plaintiff had entered and moved into the land in 2001 and that there was no sale agreement between him and the plaintiff as alleged.

The 4th Respondent in opposing the Originating Summons contended that the Plaintiff claims can't be premised in adverse possession and that the 1st Defendant did not have any capacity to sale and transfer the land when the Plaintiff alleges to have bought it. He states that property interest had passed on the 4th defendant in 2015 and the allegation that the 1st and 2nd defendants had failed to take out consent to transfer is baseless as there was no sale agreement.

After hearing the testimony of the witness the parties had filed their submissions and the issue for determination was whether the plaintiff has proved a claim of adverse possession. What constitutes adverse possession is now settled. The Plaintiff contends that he had entered into the suit land by way of sale, however the 1st, 2nd and 3rd defendants failed to procure the required consent to transfer the land from the Land Control Board and the plaintiff contends that he has been in continuous, open and uninterrupted possession of the land since 2001 and thus his title to the land has become adverse to that of the defendants. He further states that the 4th defendant who is alleged to have purchased the land had found him on the land. the basis of his entry to the land was by way of a sale agreement.

I have considered the Originating Summons, the Replying Affidavit and the rival submissions filed by the parties. It is trite law that for a claim of adverse possession to be successful a party must establish that the possession and occupation was hostile, open, continuous for a period of over 12 years. The plaintiff's claim though took possession and occupation with the permission of the 1st 2nd and 3rd defendants by way of a sale agreement the same from the evidence was not completed on the 1st and 2nd defendant had failed to procure the requisite consent to transfer the land. The issue for determination is therefore when does time start running. Is it when the sale agreement or when the time lapsed for the defendant to set the consent to transfer. It is my finding that the consent to transfer was a conditional precedent to familiarize the transfer and thus it is upon the expiry of the period to set the consent that the time started running. The Defendants have not shown how the plaintiff was on their land they did not seek to evict him out of the land for all those years and on that basis I find that though the plaintiff had entered the land with permission initially that permission was repudiated upon the 1st, 2nd and 3rd defendants' failure to set the consent and hence after this period the plaintiff's possession and title to the land becomes open and hostile to that of the 1st defendants.

The upshot of the above is that I find the plaintiff has proved his claim on a balance of probabilities and has satisfied the conditions of ingredients of a claim of adverse possession and I accordingly enter judgement for the plaintiff against the Defendants in the following terms:

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1. A declaration do issue that defendants' rights to recover the 35 acres out of LR No. Trans Mara/Poroko/107 is barred under the limitation of Actions Act and their title is extinguished on the grounds of adverse possession.
2. That an order do hereby issue to register the plaintiff as the proprietor of the portion measuring 35 acres out of LR Trans Mara/Poroko/107.
3. That an order of injunction do issue restraining the defendants either by themselves, agents, or whomsoever acting on their instructions from interfering with the plaintiff's occupation and possession of the area measuring 35 acres of the suit land.
4. That the Deputy Registrar of this court of the Executive Officer is directed to execute the application for consent to transfer, mutation and transfer instruments to facilitate the transfer and the registration of the 35 acres out of LR Trans Mara/Poroko/107 to the plaintiff.
5. The costs to the plaintiff.

DATED, SIGNED and DELIVERED ELECTRONICALLY on this 30th day of July, 2018.

Mohammed Kullow

Judge

30/7/18

In the presence of:

CA:Chuma

Mr Ogutu for the Plaintiff

Mr Kimoni holding brief for Nyaosi for all the defendants

Mohammed Kullow

Judge

