



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L APPEAL NO. 4 OF 2015

SIRO LEO.....APPELLANT

VERSUS

JULIUS AMBOGA ASAVA &

IRENE EDESA ASAVA

(Suing as administrators of the Estate of

JACKTON ASAVA AKIBAYA (DECEASED).....RESPONDENTS

JUDGMENT

Julius Amboga Asava and Irene Edesa Asava (hereinafter referred to as the respondents) filed a suit in the Lower Court against **Siro Leo**. (hereinafter referred to as the appellant) claiming to be the administrators of the Estate of Jackton Asava Akibaya

It was stated in the plaint that before he died, Jackton Asava Akibaya had bought land reference number King'ong'o Block 21/580 however the appellant raised claim over the said parcel of land and threatened to evict the plaintiffs from the said parcel of land without any lawful reason which parcel of land the respondents had been in occupation. The respondents prayed for a permanent injunction against the appellant.

The appellant filed defence claiming to be the rightful owner of the plot having purchased the same from the rightful owner Kirwa Arap Birgen when the 1st respondent was a toddler and the 2nd respondent was unborn and that an agreement was executed voluntarily by parties over the same. The appellant claimed to have settled the family on the plot and lives there to-date. The appellant averred that the suit was defective and untenable in law for non-joinder.

When the matter was for hearing before the honorable magistrate, Julius Amboga Asava testified that at the material time he lived at Kongoni Location, Nyunga Location, Lugari District and worked for Kenya Power & Lighting Company, Taveta. He filed the suit jointly together with Irene Edesa Asava. He stated that Jackton Akibaya was his late father and that they obtained a grant of letters of administration ad litem issued on the 16th March, 2006 which he produced in court. The appellant was a neighbor of their parcel of land King'ong'o Block 21/580 Eldoret Municipality. They sued the appellant because he wanted to convert their parcel of land. After their father passed away, a lady one Violet Cheloti pointed to him the parcel of land. Later, when he wanted to develop the plot, the appellant claimed ownership of the plot. They called a meeting of Elders who decided that the plot belongs to the respondents and was advised to fence the plot. He fenced the plot but later heard that the appellant encroached on the plot and started to cultivate the same. He had map showing their Plot No. 580 and the defendants' Plot No. 579. The survey map and certificate of official search dated the 10.11.2011 were produced by the respondent in respect of the plot. The plot is registered in the names of the Trustee Andrew Kibet Kotut. He produced a letter of consent between himself and Irene Edesa Asava. He produced a wealth declaration form by his deceased father which indicated the plot as part of his asset. He further produced a police abstract issued on the 28.6.2005 at Parklands Police Station to prove that the sale agreement was lost. He produced a certified copy of his father's death certificate dated 3.3.2005. He stated that the appellant used to be cruel to him and even hired men to beat his workers whenever he tried to develop the plot. He prayed that the appellant be restrained from interfering with their plot and asked for a permanent injunction and the cost of the suit. He claimed that he was 25 years old when the appellant began to encroach on the plot.

On cross examination by Miss Oduor Advocate for the appellant, he admitted that the trustee had the plot's title deed. The plot was purchased in 1996 but he did not know the month and date. He was not present during the sale transaction. The initial owner of the plot was one Birgen. He did not have a sale agreement in respect of the plot. The plot was purchased in 1996.

Geoffrey Ndegwa Kimani stated that at the material time, he lived at Ushirika village in Eldoret. He was a farmer and the village elder. He knew Julius Amboga Asava and Irene Edesa Asava as the children of the late Jackton Akibaya who were his neighbors and also neighbors of the appellant. His evidence in the lower court was that the deceased, Jackton Akibaya came to Eldoret five years after 1979. After the

deceased passed away his young children who are the respondents visited the plot but the appellant claimed the same. They went to his place for advice but he escorted them to the area sub-chief, Mr. Rotich. According to the witness, the deceased, Jackton Akibaya owned the Plot 580.

On cross examination by Miss Oduor Advocate, he admitted that he was not present when the sale agreement for the plot was made but insisted that the deceased, Jackton Akibaya purchased the plot in 1986 from Mr. Birgen Kirwa.

Barnabas Kipkiter Mujahi gave evidence that he had lived at King'ong'o Plot No. 21 since 1964. The late Jackton Akibaya who was known to him, purchased a plot within Plot No. 21 King'ong'o from one Kirwa Birgen before his death. The plot measures ¼ acre. Jackton Akibaya had 2 children namely; Julius and another young girl. The two children in 1986 were young. He claimed that the appellant has refused the children of Jackton Akibaya from developing the plot. According to this witness, the appellant grabbed the Plot of Jackton Akibaya after latter passed away.

On cross examination by Mr. Buluma Advocate, he stated that Plot No. King'ong'o Block 21/580 was purchased very long before the suit was filed but could not recall the date. He was present when a written agreement was entered at home before village elders. Mrs. Cheloti was the one writing the agreement. Mrs. Cheloti was a resident in her own Plot in Block 21. King'ong'o which was a large parcel of land which over 100 acres. Plot King'ong'o Block 21/580 was carved out of Block 21. King'ong'o in 1992. The appellant purchased a plot other than the suit plot on parcel of land Block 21.

Andrew Kibe Kotut, the trustee of the parcels of land Block 15 Huruma, Block 21 King'ong'o and Block 23 King'ong'o, 70 years old and living at King'ong'o since 1974, stated that Jackton Asheva Akibaya, the deceased was known to him. He purchased a plot at King'ong'o through Barnabas Mutahi and Violet Cheloti. The plot purchased by Jackton Asheva Akibaya was Block 21/580. He is the one who planned and subdivided the larger plot Block 21 King'ong'o to give off plot No. King'ong'o Block 21/580. After the deceased passed away, he went to Mrs. Violet Cheloti and inquired whether he had children. He learnt that the late Jackton Akibaya had 2 children. The 2 children are not living on the plot because the appellant has claimed ownership of the plot. The appellant took advantage of the deceased death and purported to grab the plot King'ong'o Block 21/580. He assures the court that the title deed for King'ong'o Block 21/580 is in his custody as the trustee. He is registered as the owner in trust for the parcel of land King'ong'o Block 21/580. He holds the title to the land in trust to the children of the late Jackton Akibaya.

He further stated that he saw the agreement between Kirwa Birgen and Jackton Akibaya written in 1986. He received a report on the purchase of the plot by Jackton Akibaya on the following day. In 1986, the parcel of land Block 21 was not subdivided. He has a master roll for the plots but he did not carry the same in court. Jackton Akibaya passed away on a date he cannot recall. In 2009, the children of Jackton Akibaya came to him.

The appellant on his part testified that he lives at Roadblock in Eldoret. He is a retired Judicial Officer. He is staying at his place and earning his pension. In 1987, he bought a piece of land King'ong'o Block 21/580. He resides, but was stopped from ploughing the land in 2011 by the 1st respondent. He had a sale agreement dated 7.6.1997 between himself and Birgen for a consideration of KShs. 17,000 for ¼ acre. He knew Jackton Akibaya in 2007 with a neighbor, Violet Cheloti. He had been cultivating since 1987 when he occupied land. He later heard that the respondents were trying to transfer the land through a trustee.

On 3.5.2005, he was summoned by the chief to appear before him on 4.5.2005. He could not manage to do so. He wrote to the District Commissioner through his advocate, R. M. Wafula dated 6.7.2005. He received a letter from Andre Kibet Kotut, Trustee of land. When he bought this land, the 1st respondent was 2 years old whilst the 2nd respondent was not yet born.

The appellant called Benard Lagat as his witness who stated that at the material time he lived in King'ong'o Block 23 and was engaged in life as a local surveyor. He knew Kirwa Arap Birgen who sold the appellant a shamba. He knew the appellant for over 20 years. He was present during survey of this land, King'ong'o Block 21/580. Kirwa sold this land to appellant. He went to survey this land with Kirwa's son. On cross examination, he states that he has a certificate from government to work as surveyor.

The Honourable Magistrate after hearing the parties' evidence and submissions directed himself on the issues to be dealt with thus, **when the appellant bought the land, who the real owner of the parcel of land was and, whether there was adverse possession.**

On the first issue, the learned Magistrate found that the appellant bought ¼ of LR 10492/17 known as King'ong'o farm. However, the Magistrate found that the principle of adverse possession is in the favour of the appellant. The court further found that the PW4 claimed to have been entrusted with the land but how he was entrusted did not come out clearly.

The court found that L. R. No. 10492-17 known as King'ong'o Farm thereof belonged to the appellant whilst Block 21/580 belonged to the respondents. The court ordered a qualified and identified surveyors accepted by both parties to confirm the finding on the ground.

The appellant has appealed from the judgment and decree of the learned Magistrate delivered on 15.12.2014 in Eldoret CMCC No. 6 of 2011 on grounds: -

1. that the learned trial Magistrate erred in law and in fact in failing to determine the issues in controversy as presented before court.

2. that the learned Magistrate erred in law, in fact in failing to find that the appellant had a legitimate right to the suit property based on the evidence adduced and in failing to consider the appellant's submissions and lastly that the court lacked jurisdiction.

The appellant prays that the finding of the learned Magistrate be set aside and in lieu judgment be entered in favour of the appellant against the respondents.

The appellants submit that the property that was in contention was No. 21 (King'ong'o)/580. The issue was who was the owner of parcel No. 21 (King'ong'o)/580? The court did not address its mind on the ownership. It went ahead to address the ownership of L.R. 10492.

The appellant further argues that the issue of the claim being time barred was not addressed by the court. The appellant further submits that the Magistrate's court lacked jurisdiction to entertain the dispute by virtue of the Article 162(1) of the Constitution of Kenya, Section 13 of the Land Registration Act.

The respondents on their part submit that the court had jurisdiction to entertain the dispute. The respondents further submit that the issue of jurisdiction has been canvassed at the preliminary stage and a decision made and that there was no appeal and therefore, cannot be raised on main appeal.

I have considered the appeal, rival submissions and do find that the land in dispute was registered in the names of Andrew Kotut who claims to have been a trustee of the lands thus Block 15 Huruma, Block 21 King'ong'o, and Block 23 King'ong'o. He claims to have been trustee with 13 other persons. These persons are not named. He states that the plot in issue belonged to the respondents. It was not clear whether L. R. No. 10492/17 is Eldoret Municipality Block 21 (Kingongo) 580 but it appears that the latter was created from the L.R. 10492. The registered proprietor is Andrew Kotut who claims to be trustee but was registered as the absolute proprietor on the 13/3/1995. There is no evidence that he was registered as trustee. There is no evidence on record as to how the parcel of land was created. This court finds that the claim that Kotut was registered as trustee is not tenable without evidence from the elders that he was appointed as trustee.

The suit herein ought to have been brought by Kotut if indeed he was registered as the trustee being the title holder. The respondents did not have the capacity to sue the appellant as they were the beneficiaries of the alleged trust. Moreover, nothing stopped Mr. Kotut from transferring the property to the respondents.

At the preliminary stage of the proceedings, it was argued that the Magistrates courts lacked jurisdiction to entertain the dispute as the same was a claim based on trespass. The learned Magistrate in the ruling dated 1/3/2011 found, and correctly so that Tribunals under the Land Disputes Tribunals Act could not grant injunctions and that issues of eviction could only be entertained by ordinary courts. The respondents now argue that the appellants should have appealed when the ruling was made on the 1/3/2011.

This court finds that one of the issues being raised by Mr. Momanyi for the appellant is that the appellant has been in occupation of the suitland since 1987 to the date of filing the suit in 2011 and therefore the suit is time barred by virtue of section 7 of the limitation of actions act. Therefore, the learned magistrate should have considered the fact that the appellant was in adverse possession.

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

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 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.”

Section 75(6) (v) of the repealed Constitution was in the following terms:-

“(6)Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) –

a. To the extent that the law in question makes provision for the taking of possession or acquisition of property-

vi.In consequence of any law with respect to the limitation of actions.”

This issue was not pleaded in the lower court neither was evidence adduced before the lower court however the honorable magistrate framed the issue of adverse possession from the blues and even after framing it never made a decision on the issue. This court on its appellate jurisdiction cannot entertain an issue that was not before the trial court. Even if the court was to consider the principle of adverse possession it would find that the same is not applicable as none of the parties were the registered proprietors of the suit land as it was registered in the names of a 3rd Party who claims to be a trustee. Moreover, at the time of delivery of the judgment the court did not have jurisdiction to entertain a claim based on adverse possession.

I do find that the Honourable Magistrate erred in finding that the appellant was the owner of 10492/17 known as King’ong’o farm as the said issue was not before him and that no evidence supported the finding.

On the issue of jurisdiction, this court finds that by the time the Environment and Land Court was being operationalized, this matter had been filed before the Magistrate’s Court and therefore, it was properly before the Magistrate’s Court which had jurisdiction. *Before the commencement of the Land Registration Act No. 3 of 2012, the then Registered Land Act provided as follows under Section 159:*

“Civil suits and proceedings relating to the title to, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or where the dispute comes within the provision of Section 3 (1) of the Land Disputes Tribunal Act in accordance with that Act”.

Similarly, prior to its repeal in **AUGUST 2011** with the commencement of the *Environment and Land Court Act, Section 3 (1) of the then Land Disputes Tribunal Act* provided as follows:

“Subject to this Act, all cases of a civil nature involving a dispute as to –

(a)the division of, or the determination of boundaries to land, including land held in common;

(b)a claim to occupy or work land; or

(c)trespass to land shall be heard and determined by a Tribunal established under Section 4”.

This suit was filed in the subordinate Court on 11th January 2011, when both the **Land Disputes Tribunal Act** and the **Registered Land Act** were still in force. However, by the time the judgment subject of this appeal was delivered on 18th June 2015, the two laws had been repealed following the commencement of the **Environment and Land Court Act** (on 30th August 2011) and the **Land Registration Act** (on 2nd May 2012).

In **PETER GICHUKI KINGARA VS I.E.B.C AND OTHERS C.A CIVIL APPEAL No. 23 of 2013 (NYERI)** the Court said:

“It is our considered view that the passage or lapse of time does not and cannot confer jurisdiction: Jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab-initio or absent forever”

Section 23 (3) of the Interpretation and General Provisions Act comes in hand in the interpretation of repealed laws.

Section 23 (3) of that Act provides that:

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not –

(a)-

(b)-

(c)-

(d)-

(e) affect an investigation legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding, or remedy may be instituted, continued or aforesaid, and any such penalty forfeiture or punishment may be imposed as if the repealed written law had not been made".

On operation of the Environment and Land Court, the matters that were pending before the Magistrate's Court were to be handled by the Magistrate's Court unless otherwise directed by the Chief Justice.

It should be noted that following the establishment of the ***Environment and Land Court***, the ***Chief Justice***, as is mandated by law, issued ***Practice Directions*** on 9th February 2012 which were superseded by those issued on 20th September 2012 and later by those issued on 9th November 2012. Practice Direction No. 7 thereof is relevant to this appeal and it reads:

"Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the Courts have the requisite pecuniary jurisdiction"

The Magistrate's Court had jurisdiction to entertain the dispute before it as it was pending hearing and determination when the relevant laws were repealed and that it has not been demonstrated by the appellant that the learned magistrate A. Alego lacked the pecuniary jurisdiction. Moreover, the value of the subject matter was not disclosed.

However, the court finds that the Honorable Magistrate erred in ordering for a qualified and identified county surveyors accepted by both parties to confirm the finding on the ground as parcel No. 21/580 as per the Certificate of Search is distinct from L. R. No. 10492-17. The court should have directed that the county land registrar and the county land surveyor to appear before the court and give evidence during trial on the status of the two parcels of land. Moreover, the court should have ordered Mr. Andrea Kibet Kotut to be enjoined as a party as a defendant as the trustee or as the registered proprietor.

Ultimately, the Hon Magistrates finding that L. R. No. 10492-17 known as King'ong'o Farm thereof belonged to the appellant is hereby set aside since there was no basis for that finding. Equally, there was no basis that Plot No. 21/580 belonged to the Estate of the deceased Asava Akibaya, as the registered owner was Mr. Andrew Kotut and was not a party. The upshot of the above is that the appeal is allowed, the judgment is hereby quashed and the matter is referred back to the Chief Magistrate's Court Eldoret for re-trial. Mr. Andrew Kotut to be made a party as a defendant. The matter to be heard de novo before a magistrate other than Hon.A Alego. Each party to bear own costs. Orders accordingly.

Dated and delivered at Eldoret this 26th day of July, 2018.

A. OMBWAYO

JUDGE