



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 330 OF 2017 (OS)

CATHY ALUCIA JEBOR KIPLAGAT.....PLAINTIFF

VERSUS

VINCENT KOMEN KRELKUT.....DEFENDANT

JUDGMENT

Plaintiff's Case

Cathy Alucia Jebor Kiplagat (*hereinafter referred to as the plaintiff*) has come to court against Vincent Komen Krelkut (*hereinafter referred to as the defendant*) claiming to be entitled to five (5) acres comprised in the suit parcel of land known as **L. R. NO. MOIBEKI/MOIBEKI/BLOCK 1(MOIBEN)/66** registered in the names of the defendant through adverse possession and prays for determination of the following issues: -

- (a) Whether the plaintiff, Cathy Alucia Jebor Kiplagat has obtained title by adverse possession over five (5) acres comprised in the suit parcel of land known as L. R. NO. MOIBEKI/MOIBEKI/BLOCK 1(MOIBEN)/66 having been in uninterrupted possession and use of the same since February, 2005.***
- (b) Whether the defendant's title over the aforesaid portion has been extinguished by dint of adverse possession as provided by the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.***
- (c) Whether the plaintiff is the bonafide purchaser for value of five (5) acres comprised in the suit parcel of land known as L. R. NO. MOIBEKI/MOIBEKI/BLOCK 1(MOIBEN)/66 having purchased the same for value from the defendant/respondent in February, 2005.***
- (d) Whether the five (5) aforesaid belonging to the plaintiff should be transferred to her forthwith.***
- (e) Whether a vesting order should issue vesting the five (5) acres comprised in the suit parcel of land in the plaintiff.***
- (f) Whether the defendant should be ordered to sign the requisite transfer documents in favour of the plaintiff for the five (5) acres comprised in L. R. NO. MOIBEKI/MOIBEKI/BLOCK 1(MOIBEN)/66 and or in the alternative the Deputy Registrar be allowed to sign the said documents on his behalf.***
- (g) That the defendant be condemned to pay the costs of the originating summons.***

The originating summons is supported by the affidavit of the plaintiff who states that she is the *bonafide* purchaser for value of five (5) acres comprised in L.R NO. MOIBEKI/MOIBEKI/BLOCK 1 (MOIBEN)/66 having purchased the same from the Defendant vide a mutual oral agreement. That she has been in occupation and use of the suit parcel of land from February, 2005 to-date without any interruption from anybody including the defendant.

The defendant was introduced to her as the owner of the suit parcel of land by her brother one Lazarus Cheptoo after which they met and agreed on the consideration at Kshs. 45,000 per acre making a total of Kshs.225,000.

The rest of the consideration was paid in cash to the defendant through Phillip Cheptoo who is the plaintiff's younger brother but the sale agreement became null and void by operation of law as no consent of the Land Board was obtained as stipulated by law.

According to the plaintiff the failure to obtain the requisite consent of the Land Control Board was occasioned by the Defendant who refused to execute the requisite forms and/or whose whereabouts are unknown to her since he relocated from the suit parcel of land in February, 2005. That all her attempts/efforts through the local administration to compel the Defendant to execute the requisite forms have been futile

hence rendering this suit necessary.

The Defendant and his family relocated shortly after he was paid and did not disclose his new residence which residence remains unknown to-date hence further hindering the transfer process. She immediately took possession and use of the said parcel of land where she has lived without any interruption to-date.

The defendant remains registered owner by virtue of the fact that no transfer was effected in her favour after the transaction was completed.

The Plaintiff's Evidence

When the matter came for hearing, **Cathy Alucia Jebor Kiplagat, the plaintiff** stated in her evidence that she is the bonafide purchaser for value of five (5) acres comprised in L.R NO. 3 MOIBEKI/MOIBEKI/ BLOCK 1(MOIBEN)/66 having purchased the same from the Defendant vide a mutual oral agreement in the year 2005. That the purchase price was agreed at Kshs. 45,000 per acre making a total of Kshs. 225,000. That she has been in occupation and use of the suit parcel of land from February, 2005 to date without any interruption from anybody including the Respondent.

The plaintiff was introduced to the defendant as the owner of the suit parcel of land by her brother one Lazaro Kipkoech Cheptoo. That she paid the total consideration in full through Phillip Cheptoo who is her younger brother.

That failure by her to obtain the requisite consent of the Land Control Board was occasioned by the defendant who refused to execute the requisite forms and/or whose whereabouts are unknown. All her attempts/efforts through the local administration to compel the Respondent to execute the requisite forms have been futile and that albeit having undertaken survey work on 2nd September, 2011, the Respondent has never effected transfer in favour of the Applicant/Plaintiff.

The Defendant and his family relocated shortly after the sale and did not disclose his new residence which residence remains unknown to-date hence further hindering the transfer process. The Plaintiff immediately took possession and use of the said parcel of land since February, 2005 where she lives to-date without any interruption. The Plaintiff has extensively carried out development on the suit parcel. The defendant remains registered as the owner of the suit parcel by virtue of the fact that no transfer was effected in favour of the Plaintiff after the transaction was completed.

The Plaintiff stands to suffer substantial loss and damage should the orders sought herein not be granted as prayed as she has called the suit parcel of land home for more than twelve years and there is a danger of her and her family being rendered destitute should the Respondent make good his threats of eviction and/or transferring the suit land to third parties by virtue of being the registered owner with the custody of the original title deed. The Respondent has since refused and/or ignored to execute the relevant transfers/completion forms in favour of the Plaintiff/respondent hence rendering the suit necessary.

The plaintiff further states that his efforts to locate the Defendant in order to execute the transfer documents and the application for consent of the land board in her favor have been in vain as his whereabouts remain unknown. That the sale agreement abovementioned became null and void by operation of law in 2005 as no consent of the Land Board was obtained as stipulated by law hence her prayer for adverse possession.

PW2 Lazaro Kipkoech Cheptoo, states that he is the biological brother to the plaintiff and That his sister, the Plaintiff had asked him to get her land to buy. That in February 2005, he met the brother to the Defendant famously known **as "Kamitot"** who informed him that his brother, the Defendant was selling his land. He was told that the land he was selling measured 23 Acres and that he was selling the whole parcel. PW2 looked for the purchasers for the whole parcel.

He further states that Phillip Kendagor could not raise the purchase price for the eight acres he originally wanted, hence his younger brother one Gilbert Cheptoo subsequently purchased three (3) acres therefrom. That he convinced one Isaac to buy the section with the permanent house which proposal he accepted and later bought ten (10) whose purchase price was inclusive of the developments undertaken by the seller and that after agreeing on the acreage to be purchased by the respective purchasers, it was resolved that since Phillip Kendagor Cheptoo, Gilbert Cheptoo and Cathy Alucia Cheptoo were siblings; Mr. Phillip Cheptoo was to draw an agreement for his portion and that of the siblings with the seller after which he would later transfer his siblings' portions to them.

The suit parcel of land was purchased as follows:

- | | | |
|--|---|-----------------|
| (a) Cathy Alucia Jebor Cheptoo | - | 5 Acres |
| (b) Philip Kendagor Cheptoo | - | 5 Acres |
| (c) Gilbert Kipng'etich Cheptoo | - | 3 Acres |
| (d) Isaac Sugut | - | 10 Acres |

They introduced the four buyers to Kamitot who subsequently linked them with the seller, the Defendant herein. That Phillip Kendagor was given an account number where the purchase price was to be banked at Standard Chartered Bank vide Account number 0150195827900.

The purchasers subsequently deposited their purchase price into the furnished account including the Plaintiff. He even paid part of the purchase price on behalf of the Plaintiff as he was regularly in town by virtue of being a matatu driver at that material time. He confirmed that the Plaintiff has been in occupation and use of her portion comprised in the suit parcel of land since February, 2005 without any

interruptions. That he was aware that the seller had failed to effect transfer of her portion in her favour for she had even sought the intervention of the local administration in vain

Defense

The Defendant herein albeit being duly personally served with the pleadings in this matter elected not to enter appearance and/or file any defence. The plaintiff's evidence as per the pleadings and statements is therefore unchallenged.

Plaintiffs Submissions

The plaintiff submits that the following are the issues for determination by this honourable court;

1. ***Whether the Plaintiff has been in peaceful, open and uninterrupted possession and use of the suit parcel of land.***
2. ***Whether the sale agreement entered by the parties herein in February, 2005 became null and void by operation of law.***
3. ***Whether the plaintiff is entitled to the prayers sought.***
4. ***Who should bear the cost of the suit?***

WHETHER THE PLAINTIFF HAS BEEN IN PEACEFUL, OPEN AND UNINTERRUPTED POSSESSION AND USE OF THE SUIT PARCEL OF LAND

The plaintiff submits that in her pleadings, the plaintiff averred that she has been in possession of the suit parcel of land measuring five acres from February, 2005. No evidence has been provided to challenge that position and we urge you to so find.

WHETHER THE SALE AGREEMENT ENTERED BY THE PARTIES HEREIN IN FEBRUARY, 2005 BECAME NULL AND VOID BY OPERATION OF LAW

The plaintiff submits that although the plaintiff did not provide a copy of the sale agreement forming the subject matter of these proceedings, from the deposit slips produced as PEXH 1, it is evident that payments were made into the Defendant's account from February, 2005. According to the plaintiff, a contract is a voluntary arrangement between two or more parties that is enforceable by law as a binding legal agreement. Section 4 of the Limitation of Actions Act, Cap 22 provides as follows;

- (1) The following actions may not be brought after the expiry of six years from the date on which the cause of action accrued;
- (a) ***Actions founded on contract***
- (b).....
- (c).....

The plaintiff on this issue submits that the agreement in the instant case falls under the above sub-section and that the payments having been made sometimes in February 2005, the period of six years envisaged by the above provision has since lapsed and therefore the sale agreement between the parties herein having been entered in the year 2005, has indeed lapsed by dint of section 4(1) (a) of the Limitation of Actions Act, Cap. 22 hence became null and void by operation of law. We humbly urge you to so find.

WHETHER THE PLAINTIFF IS ENTITLED TO THE PRAYERS SOUGHT

The plaintiff submits that there being no evidence to challenge the plaintiff's claim, and since the plaintiff has to seek legal redress from a court of law, he is entitled to costs payable by the Defendant. On adverse possession, the plaintiff submits that she has acquired the land by virtue of being in peaceful open and uninterrupted possession and use of the suit parcel of land.

Analysis and Determination

This court finds that the only issue for determination is whether the plaintiff is in adverse possession of the suit parcel. The court of appeal in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, held that 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 license 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 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.”

I have considered the pleadings, evidence on record and submissions and do find that the plaintiff has proved on a balance of probabilities that he has been in peaceful open and uninterrupted possession and use of the suit parcel of land and therefore, he is entitled to the orders sought.

I do hereby find that the applicant, Cathy Alucia Jebor Kiplagat has obtained title by adverse possession over five (5) acres comprised in the suit parcel of land known as L. R. NO. MOIBEKI/MOIBEKI/BLOCK 1(MOIBEN)/66 having been in uninterrupted possession and use of the same since February, 2005 and that the respondent’s title over the aforesaid portion has been extinguished by dint of adverse possession as provided by the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.

The upshot of the above is that a vesting order is hereby issued vesting the five (5) acres comprised in the suit parcel of land in the plaintiff and that the defendant is hereby condemned to pay the costs of the originating summons. Orders accordingly.

Dated, signed and delivered at Eldoret this 12th day of July, 2018.

A. OMBWAYO

JUDGE