



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CIVIL APPEAL NO. 23 OF 2013

(Formerly Eldoret High Court Civil Appeal No. 184 of 2010)

CATHERINE BARTAI.....1ST APPELLANT

PHILIP ROTICH.....2ND APPELLANT

VERSUS

ROSALINE SIGAL.....1ST RESPONDENT

ISAAC KIMENJO RONGOEL.....2ND RESPONDENT

JUDGMENT

Chepkirong Chepsaina Kiptabut alias Jepkirong Jesaina Kobot Manyim filed a suit in the Principal Magistrates Court In Kapsabet on the 30th January 2006 claiming that at all material times to the suit she was the registered owner of land parcel Number Nandi/Chepterit/127. She states that she was registered as the proprietor of the said land Nandi/Chepterit/127 on first registration. She claimed that the 1st and 2nd appellants had lodged a false claim over her land parcel No. Nandi/Chepterit/127 and that the two were residing on the land and that the appellants' claim on the land was illegal as the land is registered in her names. She prayed that the appellants be restrained by way of permanent injunction from claiming, ploughing, fencing, registering themselves as proprietors and or transacting and or dealing in any manner whatsoever over land parcel No. Nandi/Chepterit/127. She further prayed for an order of declaration that she was the sole legal owner of land parcel No. Nandi/Chepterit/127.

The appellants filed a joint amended defence stating that the respondent had sold the land to a 3rd party and that they have a right to claim the land. They claimed to be the legal occupants of the land. The appellants further stated that there was a suit before the lower court emanating from the Kosirai Land Disputes Tribunal vides Kapsabet LDT No. 2 of 2006.

When the matter came for hearing, before the learned Magistrate on 7th September 2006, the *plaintiff testified* that she is the registered proprietor of the suit parcel that was given to her by her father. She stayed on the land for one year before going to Kitale to stay with her sons. When she went back to the land she found the appellants staying on the land without her consent. She never sold the appellants the land and never went to the land control board. The matter was referred to the Kosirai Land Disputes Tribunal but was not resolved. On cross examination by Mr Sagassi, she states that she left the appellants staying on the land but never sold it to them. She states that she gave John Arap Songol 2 acres of the suit land and not the defendants. The land is still registered in her names and not the appellants'. She never gave land to the appellants but confirms that the appellants are occupying the land she gave John Arap Songol.

PW2 was James Koskei, an Assistant Land Registrar at Kapsabet. His duties were registration of documents, issuing official searches and access to land registers. He testified that the land was never sold to the appellants. There had been no transfer and no consent of the Land Control Board. *PW3, Wycliffe Kwendo Olonye*, a Land Registrar at the District Land Registry in Kapsabet testified that he registers documents, issues title deeds, arbitrates on land disputes and keeps records for purchases of land registered. According to PW3, the proprietor of the suit land was Jesaina Kobot Manyim having been registered in 1970 as first registration. He produced the adjudication record.

DW1, Catherine Bartai states that the Tribunal found that the parcel of land belonged to the DW1. She produced the decision of the Tribunal. According to DW1, the dispute was over 12 acres comprised in the suit parcel of land. She claimed to have occupied Nandi/Chepterit/127 since 1974. The disputed 12 acres are part of 40 acres she bought from Songol John. John Songol did not transfer the 12 acres because they remained in the names of the respondent. Songol instructed the respondent to transfer the 12 acres to the appellant but the respondent refused and that they remained in possession. She states that the 12 acres are hers and she vowed not to vacate. She prayed that the case be dismissed with costs. On cross examination, she states that she bought the land from Songol but she did not have the sale agreement.

DW2, Philip Cheruiyot Rotich, 2nd appellant stated that she knew the respondent but not for a long period of time. She has been a resident in the parcel of land for over 40 years. She was born on the land. The land had not been transferred to them. The plaintiff signed the application for consent but failed to attend the Board. The dispute was taken to the Land Disputes Tribunal which decided that the land belonged to the appellants. On cross examination, he states that the proceedings of the Land Disputes Tribunal had not been adopted by the court.

DW3, John Kipyego Songol states that he owned a farm in Chepterit which he sold. He bought 2 acres from **Chepkirong Chepsaina Kiptabut alias Jepkirong Jesaina Kobot Manyim**. Adjacent to the land, there was a marshland which belonged to **Chepkirong Chepsaina Kiptabut alias Jepkirong Jesaina Kobot Manyim** because of the 2 acres. He occupied the land for 4 years and sold it to the Michael Bartai. She gave him a title deed for the land. He later sold the land to Bartai. He took Bartai to **Chepkirong Chepsaina Kiptabut alias Jepkirong Jesaina Kobot Manyim** and she agreed to transfer the land to Bartai. He gave the title deed to Bartai. According to DW3, the deceased could not claim the land he sold to John Songol which Songol sold to Bartai.

The chairman of Kosirai Land Disputes Tribunal testified that the land belonged to the appellant.

After hearing the parties, their witnesses and after considering the submissions by the plaintiff, the honourable court found that John Songol purchased 2 acres of the suit property and decided to fence off the marshy area near the two acres plus the two acres. He thought that the land belonged to nobody. The learned Magistrate observed that since John Songol bought 2 acres only, he could not transfer more than 2 acres. That a person cannot transfer what he does not have. He bought 2 acres from Bartai hence could not purport to transfer 12 acres. The learned Magistrate found that the suit property was 5.2 Ha and that the late Bartai and family were entitled to what John Kipyego Songol owed thus, 2 acres. Judgment was entered for the plaintiff against the defendant jointly and severally declaring that the plaintiff is the owner of the suit property saves for the 2 acres of land she sold to John Kipyegon Songol which he in turn sold to the defendant's father and husband (deceased).

The court ordered the Land Registrar in the larger Nandi District to subdivide the suit property and register two acres thereof in the names of the defendants. The rest of the suit property was to remain in the names of the plaintiff.

The defendants appealed on grounds:

- 1. That the learned trial Magistrate erred in law and fact by ignoring and/or failing to consider the appellants' evidence that they had stayed and/or lived on the suit land since 1974 and that therefore they had a right to claim the entire suit land.**
- 2. That the learned trial Magistrate erred in law and fact in disregarding and disbelieving the evidence of the appellants together with that of their witnesses.**
- 3. That the learned trial Magistrate erred in law and fact in holding that the appellants are entitled to only two acres at the upper part of the suit property.**
- 4. That the learned trial Magistrate erred in law and fact in ordering the Land Registrar in the larger Nandi District to subdivide the suit property and register the 2 acres in the names of the appellants and the rest of the suit property to remain in the names of the respondent.**

The appellants pray for:

- (a) This Honourable court does find that the appellants are entitled to the entire suit property.**
- (b) The appellants be awarded costs of this appeal.**
- (c) Any such further and/or other relief this Honourable Court may deem fit to grant.**

In a nutshell, the appellants argue that the appellant is entitled to the suit property through adverse possession and therefore, the trial Magistrate erred in failing to find that the parties were entitled to the property through adverse possession. Counsel for the appellants submits that the learned Magistrate failed to address the issue of adverse possession. The appellants further submit that they did not require letters of administration because the suit was based on adverse possession.

The respondent on the other hand submits that the appellant has raised a new issue of adverse possession which was not pleaded and not proved.

ANALYSIS AND DETERMINATION

I have considered the pleadings, evidence on record and judgment of court and the submissions by the appellant and response and do find the following issues ripe for determination:

- 1. Whether the issue of adverse possession was introduced on appeal.**
- 2. Whether adverse possession was proved anyway.**
- 3. Whether adverse possession can be instituted in the Lower Court.**

4. Whether the suit in the Lower Court was a nullity for lack of letters of administration.

5. The effect of the decision of the Tribunal.

On whether the issue of adverse possession was introduced on appeal. This court finds that the gist of the claim by the respondent was an order declaring that the deceased father of the respondent was the sole lawful owner of land parcel Number Nandi/Chepterit/127. The gist of the defendant's defence was that they were entitled to the land as they have a legal right to claim the land. Moreover, that they are lawful occupants of the land and that they are entitled to the land following the sale of the land by the plaintiff to a *bonafide* purchaser for value.

The evidence of the Chepkirong Chepsaina Kiptabut is clear that the land in dispute was given to him by her father. She stayed in the land for one year and went to Kitale to stay with his sons. On return she found the defendants staying in the land without her consent. She states that she never went to the Land Control Board but attended the Land Disputes Tribunal but no solution was found. On cross examination, she admits having sold to John Arap Songol 2 acres and was ready to give the defendants 2 acres. It is not disputed that the land in dispute is registered in the names of the plaintiff. This was demonstrated by PW2 and PW3.

Therefore on the issue as to whether adverse possession arose was raised in the Lower Court, I do find that it was neither pleaded in the defence nor raised in the evidence of any party in the proceedings nor in the submissions of the parties before the lower court and therefore the court rightfully did not determine the issue of adverse possession because it was neither pleaded nor proved. In **George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015**, the Court of Appeal reasoned as follows regarding new issues that are raised before it for the first time:

“In general a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction.”

The court of Appeal referred to the case of **North Staffordshire Railway Company v. Edge [1920] A.C. 254, Lord Birkenhead, L.C.** explained the reason why an appellate Court is reluctant to entertain new points on appeal:

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

On whether adverse possession was proved, this court finds that from the evidence on record, it was not demonstrated that the defendants entered the suit property without permissions and were in occupation and possession of the said property with the knowledge of the plaintiff for more than 12 years.

On whether adverse possession can be instituted in the Lower Court. And therefore the Magistrate's Court have no jurisdiction to entertain the claim based on adverse possession. Section 37 of the Limitation of Actions Act provides for the Application of the Act to registered land thus:- **This Act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap 300)(repealed) , in the same manner and to the same extent as it applies to land not so registered, except that— where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act; an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.**

Section 38 provides for Registration of title to land or easement acquired under Act thus:

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

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

The civil procedure rules provide for the procedure of commencing a suit based on adverse possession thus:-

(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.

The import of the above is that there was no claim of adverse possession before the learned magistrate and that if there was such a claim, the learned magistrate did not have jurisdiction to entertain the same as the provisions of section 38 of the Limitation of Actions Act gives jurisdiction to the Environment and land court.

On the issue as to whether the defendant's claim was shaking for lack of letters of administration, this court finds that there is no counterclaim by the defendants and therefore, the issue of letters of administration does not arise. They were sued as trespassers and an action based on trespass is against the trespasser and does not survive on death of the trespasser as it is an act in persona.

Lastly, on ***the effect of the decision of the Tribunal***. The court finds that failure to adopt the Award of the elders in the Kosirai Land Disputes Tribunal by the Magistrates court meant that the proceedings and award were not validated and therefore, nothing turns on them. The appeal herein lacks merit and is dismissed with costs.

Dated, signed and delivered at Eldoret this 10th day of August, 2018.

A. OMBWAYO

JUDGE