



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 139 OF 2013

HESBON GAVIHI VODOTI.....PLAINTIFF

VERSUS

PAUL K. KIPKWON.....1ST DEFENDANT

THOMAS KIPROP.....2ND DEFENDANT

JUDGMENT

Hesbon Gavihi Vodoti (hereinafter referred to as the plaintiff) has come to court claiming that he is the registered proprietor of all that parcel of land known as *Nandi/Kiminda/895* measuring 1.82 hectares having acquired the title in the year 1983 and that the Defendants, their servants, agents and or employees have without any lawful justification and or reason encroached onto the Plaintiff's parcel of land NANDI/KIMINDA/895 and have refused to move away therefrom. That the defendants, their servants, agents and or employees encroached onto the Plaintiff's land parcel since the year 1995 making it impossible for the Plaintiff to make use of the land.

The plaintiff's claim against the defendants is for a declaration that the Defendants are trespassers onto the land parcel NANDI/KIMINDA/895 and that the Plaintiff is the legal owner of all the parcel of land known as NANDI/KIMINDA/895. The plaintiff prays for an eviction order evicting the defendants, their servants, agents and or employees from land parcel NANDI/KIMINDA/895.

The plaintiff prays that upon the defendants vacating land parcel NANDI/KIMINDA/895, an order of permanent injunction restraining the defendants from trespassing into the Plaintiff's land parcel NANDI/KIMINDA/895 and or in any other way interfering therewith. The Plaintiff prays for mesne profits from the year 1995 when the Defendants entered the suit land until judgment is delivered.

The defendants filed defence and counterclaim denying the contents of the plaint generally and put the plaintiff to strict proof. The defendants denied allegation that the plaintiff was the registered owner of the suit property. The 1st defendant states that he has lived on the suit property since 1975 when the same was bought by his family. The 1st defendant states that he has acquired adverse possession having been in occupation and possession on the said parcel of land for over 35 years peacefully, open uninterrupted until January, 2013.

The 1st defendant counterclaims on adverse possession since the year 1975 to the time of filing the suit. The occupation has been peaceful, open and uninterrupted by the plaintiff until January, 2013. The 1st defendant avers that the plaintiff's right to the property has been extinguished.

The 1st defendant prays for the dismissal of the plaintiff's suit with cost and a declaration that the 1st defendant is the legal owner of all that parcel of land NANDI/KIMINDA/895 by dint of adverse possession and a land title to issue in favour of the 1st defendant. He further prays for a permanent injunction restraining the plaintiff, his agents, servants or employees from entering, trespassing or interfering with the land parcel No. NANDI/KIMINDA/895 plus Costs and interest of the counterclaim.

In the reply to defence, the plaintiff denies that the 1st defendant has lived on the suit property since 1975 when the same was bought by the family. He denies that the 1st defendant has acquired adverse possession and that he is entitled to the orders sought. The claim based on adverse possession is denied and the plaintiff prays dismissal of the suit and the counterclaim.

When the matter came for hearing, **the plaintiff** testified that he comes from Kapsabet and that the defendants are occupying his land. He acquired the original title deed and a certificate of official Search. He bought the land from Malakwen Arap Chemor. He filed Case No. 100 of 1976. He lived on the land for 7 years from 1975 to 1981. There were clashes and their houses were demolished and they were chased away. Later, the parents of the defendants called them back for their land.

On cross examination from Kirara, learned counsel for the defendants, he states that he got his title in 1983. He stated that the 1st defendant lived in the land before the plaintiff got his title. He went to the District Commissioner but he was told that the title was fake. They did not

report the invasion to the police. The District Commissioner referred them to court. The defendants stay on his land illegally.

DW1, Paul Kiprotich Chepkwon states that he lives in Nandi County and is a farmer. He lives in Plot No. 895 registered in the name of the plaintiff. He has lived in the land since 1997 with his family. He was born and bred on the land. His grandmother died and was buried on the land in 1998. The plaintiff has never reported to the police station that the defendants invaded his land. He prays for judgment against the plaintiff.

DW2 was Christopher Kiplangat Bore states that Pauline Sioror was his aunt and her husband was brother to his father (uncle). He lived with her since his birth in 1954 in Longisa Division in Bomet district. She was married to the late Sioror. She was unable to get children as she was barren. In 1971, due to her inability to bear children, she married vide the Kipsigis customary. In Kipsigis customs, an old woman who is unable to bear children can marry a young girl in order to bear her children for care and inheritance purposes. In 1971, she married Raeli, the mother of Paul Kiprotich Chepkwony. In 1972, she married her 2nd wife called Elizabeth Maridany. In 1975, she sold her land in Bomet and purchased the land now in dispute from Mr. Malakwen. From Bomet, she came with her nephew by the name Philip Maridany who assisted her in purchasing the said land. The sale agreement was written in the name of Philip Maridany. She lived on the land since 1975 and in fact developed it. Her children were born on this parcel of land. In 1983, he came from Bomet to witness her third wedding to Ann Chebet Mosonik in accordance with the Kipsigis Customs. In 1983, she became sickly all through and passed on in 1998. She left behind her three wives which include Ann Chebet and children which includes Paul Chepkwony and Paul Kipkwon. They have lived on this suit land since birth. There has never been any suit or dispute touching on this land and involving the parties herein from 1975 to 2013 when the defendants were served with plaint and summons to enter appearance. The defendants have lived on this land for so many years continuously, in peace and without any interruptions and he is surprised that someone wants to evict them. They have no other home as the land now in dispute is their own and in fact have developed and planted tea on it.

DW3, Nyebute Kuto states that he was a village elder of Tirop Tet village, Kiminda Sub-Location for over 30 years. He is now 75 years of age. He knows Arap Chemwor, he was the owner of land parcel No. NANDI/KIMINDA/550 which he later on sold to Sioror in 1975. Philip Maridany was the next of kin of Sioror. Chebet Ann was the wife of Sioror. Paul Chepkwony and **Thomas Kiproop** were the children of Sioror. The plaintiffs were never sold any land by Malakwen. He knows the defendants as the owners of the land now in dispute having inherited it from their late father and lived on it for over 30 years. For all the years, he has been in this village now for over 35 years. He is not aware of any dispute touching the land now in dispute; the plaintiff has never been a resident of Kiminda. The defendants have lived on it peacefully and uninterrupted for so many years. The land, he confirms, belongs to the defendants.

DW4, Kiptenai Arap Rotich, the village elder of Kiropgei, a village within Kiminda Sub-Location from 1974 until his recent retirement states that he knows the defendants herein and the history of the land now in dispute. He was a witness towards the purchase of the land now in dispute which was registered at the time as Nandi/Kiminda/550. The land was bought by Sioror. The land was sold to her in 1975 by one Mr. Malakwen. Ann Chebet was the wife of Sioror and Paul Kipkwon and Thomas Kiproop were the sons of Sioror. There has never been any dispute on this land between the parties to this suit; no case was ever reported to him. The land does not belong to the plaintiffs. The defendants have lived on this land for so many years without any interruptions. The plaintiff has never been a resident of Kiminda.

On cross examination by Mr. Mwinamo, he does not remember the parcel number.

DW5 is John Kiprotich Birech who states that he knows the defendants herein and the history of the land now in dispute. He was a witness towards the purchase of the land now in dispute which was registered at the time as Nandi/Kiminda/550. The land was bought by Sioror. The land was sold to her in 1975 by one Mr. Malakwen. Ann Chebet was the wife of Sioror and Paul was the son of Sioror. He was the village elder of Kiropgei, a village within Kiminda Sub-Location from 1974 until his recent retirement. There has never been any dispute on this land between the parties to this suit; no case was ever reported to him. The defendants should not be evicted as the land belongs to them. The land does not belong to the plaintiffs. The defendants have lived on this land for so many years without any interruptions. The plaintiff has never been a resident of Kiminda.

The plaintiff submits that he obtained title to the suit land pursuant to the proceedings and judgment in Eldoret Hccc No. 100 of 1976 John Imbeiza Vodaye and Another Vs Malakwen Arap Chemor which vested the suit land into his name. the 1st defendant's parents sat on their rights and never followed up on the right procedure hence are hiding behind adverse possession. Moreover, that the claim on adverse possession has not been proved and the same should have been brought by originating summons and not counterclaim.

The defendant submits that the plaintiff's suit is formed by Limitation of Actions Act. Section 13 thereof. The 1st defendant has been in possession for more than 12 years before the filing of the suit.

The defendants further submit that they have been in actual, open, peaceful, uninterrupted and continuous possession of the suit property for more than 12 years and therefore, the plaintiff's rights have been extinguished by effluxion of time. The defendant contends that the counterclaim is proper before court. He cites the provision of Article 151(d) and (e) of the Constitution of Kenya, 2010. The defendant submits that the reliefs sought can be granted.

I have considered the evidence on record, the submissions of counsel and do find that the plaintiff is the registered proprietor of the parcel of land having been registered on the 27th day of July, 1983. He produced the title deed and the certificate of official Search to that effect.

Sections 24 of the Land Registrations Act 2012 that provides as follows: -

(a)- the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b)-the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or

expressed agreements, liabilities or incidents of the lease.

Section 25 provides for the rights of a proprietor thus 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

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 of the Act that provides that a Certificate of title to be held as conclusive evidence of proprietorship has an exception thus;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The plaintiff according to the above regime of law is entitled to the suit property. However, the plaintiff was registered proprietor of the land in the year 1983 when the defendants were already residing in the land. The plaintiff admitted that he was registered when the defendants were already living in the land. The allegations that the plaintiff was forcefully ejected and his property burnt is not substantiated. There is no evidence from any police station that the alleged violence meted on the plaintiff was reported to any police station. There is no explanation why the plaintiff took more than 12 years to sue the defendants to recover land. The plaintiff himself stated that he never gave consent to the defendants to occupy his land.

The legal principle of adverse possession 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 do find that the plaintiff has satisfied this court to be in adverse possession of the suit property.

The procedure of filing a plaint or counterclaim to claim adverse possession is not strange in law and the same is not fatal. The Civil Procedure Rules are handmaidens of justice and therefore, failure to follow the procedure cannot defeat a right. Moreover, the same is cured

by Article 159 of the Constitution of Kenya that requires the court not to put undue regard on procedural technicalities.

The upshot of the above is that the 1st defendant has established that he is in adverse possession of the suit property and therefore, the counterclaim succeeds. The plaintiff's suit is dismissed with costs.

The counterclaim succeeds and therefore this court issues a declaration that the 1st defendant is the legal owner of all that parcel of land NANDI/KIMINDA/895 by dint of adverse possession and a land title to issue in favor of the 1st defendant. Further this court issues a permanent injunction restraining the plaintiff, his agents, servants or employees from entering, trespassing or interfering with the land parcel No. NANDI/KIMINDA/895. Costs and interest of the counterclaim are hereby awarded to the defendants.

Dated and delivered at Eldoret this 21st day of December, 2018.

A. OMBWAYO

JUDGE