



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 261 OF 2016

GRACE JESOIMO TARUS.....1ST PLAINTIFF/APPLICANT

JOB CHIRCHIR.....2ND PLAINTIFF/APPLICANT

VERSUS

SARAH ROP1ST DEFENDANT/RESPONDENT

ELBINA JELIMO.....2ND DEFENDANT/RESPONDENT

WILSON KIMAIYO KEBENEI.....3RD DEFENDANT/RESPONDENT

JUDGMENT

By an originating summons dated 12th September 2016 the plaintiffs herein sued the defendants seeking for orders that this Honourable Court declares that the proprietor's interest in the whole of parcel Nandi/Chepkunyuk/629 be extinguished and on such declaration her name, successors in title, administrators or whomsoever claiming through her that may have been registered as the proprietor, be deleted from the register and the Applicants be registered as the proprietors of the whole of Nandi/Chepkunyuk/629 as they have acquired the title by way of adverse possession.

Briefly it is the plaintiffs' case that they have been in occupation of the whole parcel Nandi/Chepkunyuk/629 for a period of more than 39 years since 1979 and that their occupation has been continuous, uninterrupted, open and notorious and adverse to the Defendant's interest in the suit land. The plaintiff also stated that they have developed the suit land.

The plaintiff also stated that the 3rd defendant is the intended administrator of the estate of registered owner Jepngeny Kobot Jelimo. The plaintiff further stated that they have been in occupation of the suit land with the co-plaintiff since her husband purchased it in 1978 from Kipchirchir Arap Chemocek to the exclusion of the defendants. It was the plaintiff's evidence that her children who were born on the suit land are now adults.

The plaintiffs produced a certified copy of the register, Nandi/Chepkunyuk/629, letter of application for a certified copy of register, all pleadings and documents in Kapsabet Succession no. 186 of 2015, application for Consent of land Control Board dated 8th August, 1979 and a Chief's letter dated 10/9/79.

Counsel filed written submissions and submitted that the plaintiff's evidence is unchallenged and that they have proved that they have been in occupation of the suit land for a period on 40 years therefore adverse to the defendant's title. That the plaintiffs stated that the defendants have not been in occupation of the suit land.

Analysis and determination

The issues for determination in this case are as to whether the plaintiffs have acquired the suit parcel of land by way of adverse possession and whether they have been in continuous, uninterrupted occupation for a period of more than 12 years. The essential prerequisites of adverse possession were discussed by the Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where the court stated:

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 nor 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.”

Adverse possession is draconian in nature as it legitimizes the occupation of a person who would otherwise be termed as a trespasser. This makes it important for the stringent prescribed procedures to be followed before a person can be declared to having acquired land by way of adverse possession. This is also in a bid to stem the actions of frivolous claimants who would like to reap where they have not sown.

In the case of **TERESA WACHUKA GACHIRA v JOSEPH MWANGI GACHIRA [2009] eKLR** the Court of Appeal emphasized the importance of following the prescribed procedure in adverse possession claims. The need for production of a form of a copy of title document must be exhibited to indicate that the person sued is the registered owner of the suit land. This can be a copy of an extract of the register or an official search showing the details of the registration. Failure of such evidence is fatal to the claimant's suit as orders can be granted in respect of a parcel of land that does not belong to the respondent.

In the case of **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR** the court found that proprietorship can be established by producing a copy of an official search certified by the Registrar or a certified copy of an extract of the green card which gives the details of the entries.

In this case the plaintiff produced a copy of an extract of the green card and a copy of official search which gave the details of the entries in the register. The occupation and possession of the suit land continued even after the death of the registered owner whom the defendants wanted to administer the estate thereof. In adverse possession the death of a registered proprietor does not discontinue the possession and the time does not stop running. The successors hold the land in trust for the adverse possessor if the same had been extinguished during the lifetime of the deceased or after his or her demise. It should be noted that subdivision or transfer of the suit land does not affect the original claim of adverse possession if the same is proved that it exists.

A party cannot try to beat the dictates of the law on adverse possession by changing the character of the suit land to avoid compliance with the law. The respondent filed a succession cause to administer the estate of the deceased but at the time the same was filed the plaintiffs had acquired the suit land by way of adverse possession therefore there was nothing left to be administered.

Further on the issue of possession, the plaintiff stated that they have been in possession since the husband purchased the suit parcel of land in 1978. This means that the plaintiff have been on the suit land in excess of 30 years. The time therefore started running immediately the plaintiffs took possession of the suit land. The possession by the plaintiffs was open, uninterrupted and based on a claim of right and or occupation as a bona fide purchaser for value. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. The respondents never interfered with their possession at any time.

The land should have been transferred to the plaintiffs within a specified period after entry into the agreement in 1978 and since the same was not done, they became adverse possessors against the respondent's title. In **Mwangi & Another –v– Mwangi, (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

From the evidence on record I come to the conclusion that the plaintiffs have been in occupation of the suit land for a period of more than twelve years continuously without interruption. They are therefore entitled to be registered as owners of the suit land. The originating summons by the plaintiffs therefore succeeds. The defendant to pay costs of the suit.

DATED and DELIVERED at ELDORET this 18TH DAY of DECEMBER, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Momanyi holding brief for Mr. Chogo for Plaintiff and in the absence of the defendant.

Mr. Koech: Court Assistant