



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 981 OF 2012**

**JOSPAT KIPCHIRCHIR SIGILAI.....PLAINTIFF**

**VERSUS**

**JONAH KIPLAGAT KENDUIYWO.....DEFENDANT**

**JUDGMENT**

The plaintiff herein instituted this suit vide an originating summons dated 12<sup>th</sup> November 2012, seeking for the following prayers :-

1. The Honourable court do declare that the Defendant's interests in the 20 Acres (8.0 Ha) in the parcel of land known as KIPLOMBE/KUINET BLOCK 3 (LALAGINY) 4 is extinguished.
2. Upon the declaration in paragraph 1 above, the proprietary interest for the 20 Acres be extinguished and the Plaintiff be registered as the proprietor.
3. The land register be rectified to reflect the interest of the respondent and the Plaintiff in their respective parcels as herein.
  - (i) Josphat Kipchirchir Sigilai- KIPLOMBE/KUINET/BLOCK 3(LALAGINY) 20 Acres (8.0 Ha).
  - (ii) Jonah Kiplangat Kenduiyo- KIPLOMBE/KUINET/BLOCK 3 (LALAGINY) 4 75-95 Acres (30.35 Ha).

The originating summons was grounded on the annexed affidavit of the applicant.

Directions were taken in this matter and parties agreed to proceed by way of viva voce evidence. The originating summons and the supporting affidavit was deemed as a plaint and the replying affidavits a defence. The affidavits and the annexed documents were deemed as statements of the parties and list of documents. The parties were allowed to file additional statements in the event that they intended to call other witnesses whose evidence were not captured in the affidavits within 30 days.

Counsel informed the court that they had spoken to their clients and wanted to try mediation in this case to try a settlement. The court allowed the parties to give mediation a chance. The parties did not contact each other so a date for hearing was taken.

PW1 gave evidence and stated that they bought land together with the defendant in 1973 in Kiplombe location and that the land was subdivided in 1976 and each person got his plot. He stated that the defendant herein is the registered owner of land parcel number KIPLOMBE/KUINET/BLOCK 3(LALAGINY) 4 measuring 38.38 Ha or thereabouts.

On 26<sup>th</sup> March 1997 the Plaintiff bought from the defendant 20 Acres which was to be excised from the said parcel of land. He stated that they entered into an agreement at the offices of Birech & Co. Advocates whereby the purchase price per acre was Kshs. 44,000/ It was the plaintiff's evidence that he paid Kshs. 900,000/ vide a bankers cheque dated 26/3/97. It was a term of the agreement that the plaintiff was to take possession upon execution of the agreement.

The plaintiff produced a copy of the agreement, receipts for payment, a copy of the map of the suit land, a copy of the extract of the green card and a copy of the title. The plaintiff further gave evidence that he asked the defendant to give him the title and he promised to give him but he later told the plaintiff that he would give him the swampy part of the land.

It was the plaintiff's further evidence that he reported the matter to the Chief Kiplombe and the defendant was summoned to appear before the chief. He produced the minutes before the chief dated 13/6/11. He also stated that the chief resolved that the matter be referred to the District Officer who later referred the matter to the Land Disputes Tribunal.

The plaintiff stated that they went to the LDT and he produced the minutes of the LDT whereby the Tribunal ordered that the plaintiff be given 15 acres of arable land and 5 acres of swampy land. He also gave evidence that the award was forwarded to the Chief Magistrates Court Eldoret vide case No 28 of 2011. It was his evidence that he had leased the land from 1978 to 1992 and there was no problem until 2011. He therefore urged the court to order the defendant to give him 20 acres plus costs of the suit.

On cross examination by Counsel for the defendant, the plaintiff stated that he bought plot No. 7 and the defendant bought plot No.4 and that the defendant went to Kericho and the plaintiff leased his 90 acres. The plaintiff stated that the defendant's sons removed him from the suit land and that is the reason why he went to the Tribunal and the court. He gave evidence that he could not remember how much he was leasing the land for but he said it was about Kshs. 50,000/ and above.

The plaintiff confirmed on cross examination that they did not go to the Land Control Board and beacons were not placed. He stated that at the time of the offer and purchase the Defendant had shown and/or pointed to him the said parcel of land. The plaintiff also confirmed that the defendant appealed the decision of the Tribunal and the High Court set aside the decision vide Eldoret Judicial Review No. 2 of 2012.

The plaintiff also stated that he stays on plot No. 7 which is 400 meters from the defendant's plot No. 4 and that he did not bring the case earlier as they did not have problems and that the defendant had promised to give him the land.

On reexamination the plaintiff stated that he had stayed on the suit plot peacefully for a period of more than 12 years until 2011 and that he is claiming the portion that was sold to him.

PW2 gave evidence on the Land Dispute Tribunal proceeding of which he was one of the panelists. He stated that the dispute was between the plaintiff and the defendant and the verdict that the tribunal arrived at was that the plaintiff be given 15 acres of arable land and 5 acres of swampy land. He stated that from the land sale agreement it was evident that the plaintiff took possession immediately and that the dispute arose in 2012.

On cross examination he stated that he was not aware of the verdict of the High Court that quashed the decision of the LDT. The plaintiff therefore closed his case after this witness.

### **Defendant's Case**

DW1 Jonah Kiplangat Kenduiywo stated that his parcel of land was Kuinet Block 3 (lalaginy/4). He further stated that he sold 20 acres to the plaintiff but the plaintiff refused to take the land as it was swampy.

It was the defendant's evidence that he would give the plaintiff land in a swampy area and if he refuses, he was ready to refund him his money and that the land was occupied by his four sons.

The defendant stated that the plaintiff went away and came back 17 years later but he told him that there was no land to give and that the only option is to refund the purchase price.

The defendant on cross examination acknowledged that the plaintiff bought 20 acres of land from him, paid the whole purchase price but never got a title because he refused to take the portion that was shown to him.

DW2 Caleb Langat adopted his statement dated 1/2/18. He stated that he together with his brother Edwin Langat have been occupying the suit land since 2007. He confirmed that the plaintiff bought the land on 26/3/97 and continued to cultivate the land a fact his father knew of and that they did not interfere with the plaintiff. He also confirmed during cross-examination that the plaintiff has been on the suit land since 1978 although he was very young by then. He also stated that the tribunal case was about the 20 acres that was sold to the plaintiff and the portion.

### **Plaintiff's Submission**

Counsel for the plaintiff reiterated the plaintiff's evidence and submitted that this dispute was referred to the LDT and the verdict was that the plaintiff be given 15 acres of the arable land and 5 acres of the marshy area which decision was adopted by the Chief Magistrate's court and a decree issued on 10<sup>th</sup> November 2011. Counsel submitted that the Defendant stated that his sons are in actual occupation of the whole parcel of land, which is not true as no evidence was tendered indicating that his sons are in occupation of the entire piece of land. He submitted that the plaintiff has acquired the suit land by way of adverse possession.

It was Counsel's submission that for a party to succeed in a claim of adverse possession such party must demonstrate the following:

- a) That he has been in possession for a period of more than 12 years,
- b) The above occupation must be continuous and uninterrupted,
- c) The above possession or occupation must have been hostile and/or inconsistent with the owners' interest and/or rights in regard to the user of the land.

On the first issue Counsel cited the case of **Wambugu vs. Njuguna (1983) KLR 172** where the court held that

*"in order to acquire by the statute limitations titles to land which has known owner must have lost his right to the land either by*

*being dispossessed of it or by having discontinued his possession of it. Dispossession of the property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use '*

Counsel therefore submitted that by virtue of the fact that the Defendant entered into a sale agreement with the Plaintiff and that the Plaintiff has been cultivating and utilizing the land since 1997 to 2011, that dispossess the respondent of the property and defeats the title since after expiry of six (6) months from date of the Agreement i.e. 26/3/97, the Plaintiff became a trespasser pursuant to Limitation Cap Act 22 Laws of Kenya.

On the second issue as to whether the plaintiff has been in continuous and uninterrupted occupation Counsel submitted that during the Tribunal hearing the Defendant in his statement stated that the Plaintiff farmed around 5 Acres and used about 50 Acres to graze his animals. Counsel further cited the case of **Wambugu vs. Njuguna (1983) KLR 172** where the court stated that :-

*“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed and has discontinued his possession and not whether or not the claimant has proved that he has been in possession for the requisition number of years '*

It was Counsel's submission that the dispute herein is about the position of the land and not the actual possession of land and that the Plaintiff herein has been in peaceful, continuous and uninterrupted possession of the said parcel of land since 1997 to the year 2011 when the defendant's sons started interrupting.

Lastly on the issue as to whether the possession or occupation was hostile and /or inconsistent with the owners' interest and/or rights in regard to the use of the land, Counsel submitted that a claimant need not be physically or in actual occupation of the suit property to succeed in a suit of adverse possession.

That all that a claimant needs to establish is that the possession of the rightful owner has been discontinued and this can be shown by demonstrating that the claimant has undertaken in the suit property acts that are inconsistent with the use of the rightful owner of the suit premises. The inconsistent and/or hostile acts by the claimant are the ones that illustrates discontinuance of possession of the rightful owner and assumption of possession by the claimant.

Mr. Kiboi Counsel for the plaintiff stated that the plaintiff has established that he has openly been utilizing the said property and its use of the property has not at all been interrupted by the registered owner thus the Plaintiff's activities of planting wheat and grazing animals has been inconsistent with the rights of the registered owner and are consistent with the Plaintiff having asserted his possession over the suit property and the possession by the registered owner being discontinued.

Counsel therefore urged the court to grant the orders as prayed in the originating summons in favour of the plaintiff.

### **Defendant's Submission**

Counsel for the defendant reiterated his evidence and submitted that the defendant admitted that he entered into a sale agreement with the plaintiff on 26<sup>th</sup> March 1997 for purchase of 20 acres comprised in the suit land which measures 90 acres but that the parties did not agree on the exact location of the 20 acres within the suit land parcel.

Counsel submitted that the plaintiff lodged a dispute with the Land Disputes Tribunal whose verdict was adopted in Eldoret Land Dispute Tribunal No. 29 of 2011 which was later quashed by the Eldoret High Court in Eldoret High Court Judicial Review No. 2 of 2012. He therefore submitted that the plaintiff had not obtained title to his land parcel by adverse possession as the Plaintiff had not been in a continuous, peaceful, uninterrupted possession of the suit land parcel

Mr. Yego Counsel for the defendant further submitted that no consent of the Land Control Board was obtained in favour of the transaction and as such the agreement dated 26<sup>th</sup> March 1997 is null and void ab initio. He also submitted that the period of occupation of the suit land should be calculated from 26<sup>th</sup> March 1997 when the plaintiff bought 20 acres from the Defendant and the year 2007 when he left possession of the suit land parcel to the sons of the defendant which is 10 years.

Counsel raised the same issues for determination as the plaintiff to determine whether the plaintiff has been in possession of the suit land and whether he has acquired the 20 acres by way of adverse possession.

### **Analysis and determination**

The issues for determination in this case are whether the plaintiff has acquired the suit land by way of adverse possession and if so when the time started running for purposes of determining these rights and finally whether or not the plaintiff is entitled to the prayers in the originating summons.

The prerequisites for determining whether a claimant has acquired land by adverse possession are well settled. In the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** the Court held that;

*“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.*

It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. 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 Land Registrar or a certified copy of an extract of the green card which gives the details of the entries.

The plaintiff in this case produced a copy of an extract of the green card, a copy of a title deed of the suit land, map and sale agreement between him and the defendant. This was in compliance of a requirement that a claimant must produce proof that the land being claimed is registered in the respondent's name.

In **Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577**, it was held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. It was admitted by the defendant that he sold 20 acres to the plaintiff and that the plaintiff paid the full purchase price, the only disagreement between them was the location of the portion. The plaintiff has been in possession uninterrupted before as a licensee from 1978 when he was leasing the land but entered into a sale agreement for 20 acres in 1997 and took possession thereof.

Even if we were to compute time from 1997 when the plaintiff entered into a purchase agreement for 20 acres and took possession until 2011 when their dispute as to the location started, we would still find that the plaintiff has been in occupation for a period of 14 years. DW2 the son of the defendant advanced a line of evidence that they were staying in Kericho and moved to the suit land in 2007 and found the plaintiff on the suit land and tried to stop him from cultivating a certain portion of land. If this was true then why did the plaintiff file the complaint in 2011 and not 2007 if he had been affected by the sons of the defendant? This line was calculated to bring in the issue of time to deny the plaintiff the benefit of the 2 years to make it 12 as required by law. Counsel also submitted that the plaintiff's occupation was interrupted in 2007 making the occupation 10 years which is 2 years short of the prescribed limitation period. This was not supported by any evidence.

The plaintiff's case is on two fronts, firstly as a purchaser for value who has been in occupation and paid the full purchase price as evidenced by the agreement and admission by the defendant, secondly that having been in continuous and uninterrupted occupation for a period in excess of 12 years therefore he is entitled to be registered as an owner.

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. The defendant cannot be heard to say that he wants to refund the money because his sons are in occupation. The rights of the plaintiff as a person who is in occupation are equitable rights which are binding on the land and the land is subject to those rights therefore the defendant's sons aspirations to kick out the plaintiff on the ground that there was no Land Control Board consent is secondary. The defendant seems to be driven by the hunger for more land or otherwise by his sons.

A claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner, or in (accordance with) provisions of an agreement of sale or lease or otherwise. When the period of which permission was granted has not expired, adverse possession claim cannot succeed but if it is proved that such period was expressly or constructively terminated by effluxion of time, then it can be sustained.

Counsel for the defendant submitted that there was no consent of the Land Control Board therefore the agreement was a nullity. This emboldens the plaintiff's assertion that the period within which permission was granted had expired.

The Court correctly held in the case of **Jandu v Kirpal [1975] EA 225** that possession does not become adverse before the end of the period for which permission to occupy has been granted. Further in the case of **Wambugu vs Njuguna (1983) KLR 172** the Court held that;

*“Where the claimant is in exclusive occupation of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the license is determined”.*

It is incumbent upon a claimant to prove that he or she is in possession and use of the suit land which is inconsistent with the owner's right to the land. I find that the plaintiff has proved that he has been in possession of the suit land and therefore is entitled to 20 acres of the portion that he has been in occupation and possession of. The defendant cannot have his cake and eat it, that is retaining the land and the plaintiff's money which was paid as purchase price. It is not possible for the defendant to have the best of both worlds.

The net effect of the evidence on record, the judicial authorities cited together with the law relating to adverse possession, I am in agreement with Counsel for the plaintiff that the plaintiff has proved adverse possession and therefore enter judgment as prayed in the originating summons and make the following orders:

- 1) A declaration is hereby issued that the Defendant's interests in the 20 Acres (8.0 Ha) in the parcel of land known as KIPLOMBE/KUINET BLOCK 3 (LALAGINY) 4 is extinguished and the plaintiff be registered as the proprietor.
- 2) The land register be rectified to reflect the interest of the Plaintiff and the defendant in their respective parcels as herein as follows
  - (i) Josphat Kipchirchir Sigilai- KIPLOMBE/KUINET/BLOCK 3(LALAGINY) 20 Acres (8.0 Ha).
  - (ii) Jonah Kiplangat Kenduiyo- KIPLOMBE/KUINET/BLOCK 3 (LALAGINY) 4 75-95 Acres (30.35 Ha).
  - (iii) The defendant to pay costs of the suit.

**DATED and DELIVERED at ELDORET this 17<sup>TH</sup> DAY of DECEMBER, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Miss Kibichy holding brief for Mr. Yego for defendant and in the absence of Mr. Kiboi for the Plaintiff.

Mr. Koech: Court: Assistant.