



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 55 OF 2015 (O.S.)

JAMES KIRWA RUTO.....PLAINTIFF/APPLICANT

(The administrator of the Estate of the late Alfred Kipruto Tuitoek)

VERSUS

DAVID CHERUIYOT KIMILOT.....DEFENDANT/RESPONDENT

(The administrator of the Estate of the late Cheruiyot Kimilot)

JUDGMENT

James Kirwa Ruto, the administrator of the Estate of the late Alfred Kipruto Tuitoek (*hereinafter referred to as Plaintiff*) has filed the originating summons herein against **David Cheruiyot Kimilot**, the administrator of the Estate of the late Cheruiyot Kimilot claiming that he is in adverse possession of land parcel No. Uasin Gishu Kaptagat/150 and for determination of the following issues:

The defendants/respondents claim/interest to that portion measuring 3.5 acres comprised in that parcel of land known as Uasin Gishu/Kaptagat/150 stands extinguished by lapse of time.

That the plaintiff/applicant has obtained title and ownership of that portion of land measuring 3.5 acres or thereabouts comprised in that parcel of land known as Uasin Gishu/Kaptagat/150 by virtue of the Doctrine of Adverse Possession.

That pursuant to the foregoing, the Land Registrar, Uasin Gishu County or the Land Registrar currently in lawful custody of the Land Register in respect of land parcel No. UASIN GISHU/KAPTAGAT/150 be ordered to delete the name of Cheruiyot Kimilot from the register and replace with that of the plaintiff James Kirwa Ruto and issue him with fresh title to the portion measuring 3.5 acres comprised in the said land.

That pending the determination of this suit, this court be pleased to issue an order of temporary injunction restraining the respondent whether by himself, his agents, servants, employees and or any person claiming from him whatsoever from advertising for sale, offering for sale, sub-dividing, transferring, occupying, alienating, disposing, charging or in any way dealing with that portion of land measuring 3.5 acres comprised in that parcel of land known No. UASIN GISHU/KAPTAGAT/150.

For an order that the applicant is entitled to costs of this suit.

Any order that the honourable court shall deem fit to grant.

The originating summons is based on the supporting affidavit of James Kirwa Ruto who states that he is the son and the administrator of the estate of the late Alfred Kipruto Tuitoek and that the late Alfred Kipruto Tuitoek died on the 29th September 1992. That prior to his demise, the deceased had purchased a portion measuring 3.5 acres comprised in the parcel of land known as UASIN GISHU/KAPTAGAT/150. from Cheruiyot Kimilot.

That the late Cheruiyot Kimilot died on the 20th July, 1992 and the respondent herein is the administrator of the said estate. That after the purchase hereinabove, the late Alfred Kipruto Tuitoek moved to the suit property and continued with possession until his demise after which his dependants took over possession. Prior the demise, the deceased had moved into the property and erected fences thereon. At the moment, his estate uses the land for agricultural purposes.

They claim to have had had continuous uninterrupted possession/occupation of the portion measuring 3.5 acres comprised in the suit property for a period now exceeding 12 years prior to the filing of this suit hence estate of the late Alfred Kipruto Tuitoek has acquired title by way of adverse possession.

The respondent has acted in bad faith and has now threatened to dispose the portion occupied by the dependants of the estate of the late Alfred Kipruto Tuitoek to third parties. He is therefore apprehensive that they shall be evicted from the suit land any time now. This is informed by the facts that the respondent has commenced destruction of the barbed wire fences erected on the property and has cut down the trees on the suit property and extensively damaged crops planted on the property. The respondent has purported to lease out a portion of the disputed portion of the property and intends to evict the plaintiffs.

The intended sale/eviction is being conducted without having due regard to the interest the estate the late Alfred Kipruto Tuitoek and shall deprive the estate of the late Alfred Kipruto Tuitoek of the use of the property and a home. That it is fair and just that the orders sought in the present originating summons be obtained.

That this suit is brought timeously in the interest of justice and in utmost good faith. The plaintiff claims to have had exclusive, uninterrupted possession of the portion measuring 3.5 acres comprised in the suit land, for a period exceeding 12 years prior to the date of filing this suit.

That he is advised by his advocate now on record, which information he verily believes to be true that the estate the late Alfred Kipruto Tuitoek has acquired a good title to the portion measuring 3.5 acres for the following reasons: -

a. By virtue of having had exclusive and uninterrupted possession for over 12 years, the defendants claim over the suit land, if any, has been extinguished by the operation of Limitation of Actions Act and estate the late Alfred Kipruto Tuitoek ought to be registered as the proprietor under the doctrine of adverse possession.

b. The absence of the consent of Land Control board rendered the transaction between the registered owner and late Alfred Kipruto Tuitoek void.

That when he contacted the defendant herein over the matter, he threatened the estate of the late Alfred Kipruto Tuitoek with eviction forthwith. There is a real danger estate the late Alfred Kipruto Tuitoek and its dependants shall be evicted from the suit land and to irreparable loss unless the defendant is restrained forthwith.

That he is entitled to the orders sought in the Originating Summons because the estate the late Alfred Kipruto Tuitoek has had possession of the suit land for a period spanning over 26 years wherein a lot of emotional attachment and financial investments have been made. The defendant efforts to evict estate the late Alfred Kipruto Tuitoek and its dependants is being done without following the due process as set out by the Constitution of Kenya, 2010 as well as statute.

In the replying affidavit, the defendant states that the late ALFRED KIPRUTO TUITOEK has never purchased any portion of his father's land and the purchase agreement annexed as J.K.R 2 b is a forgery. That it is not true that the late ALFRED KIPRUTO TUITOEK nor his family moved to the suit property or at all. That it is untrue that the family of the late ALFRED KIPRUTO TUITOEK has been on the suit property for a period exceeding 12 years or at all.

That contrary to paragraph 8 of the supporting affidavit, there is no evidence of cut barbed, cut down trees or intentions to lease land, all these assertions are imagined.

That he cannot evict people who are not and have never been on the land.

That paragraph 15 of the supporting affidavit is not true as these people do nor reside nor cultivate any portion of his father's land.

That contrary to paragraph 17 of the supporting affidavit, the plaintiff's family has never occupied his father's land and therefore he has no reason to evict them from property where they are not. That the plaintiff is being used by people whom he is seeking to evict from the land whom they have had protracted dispute in cases No. P & A No. 152 of 2002, H.C.C No. 202 of 2011 and J.R (Eldoret) No. 152 of 2002, No. 834 of 2012. That this issue is an issue that ought to have been concluded in P & A No. 152 of 2002, the plaintiff slept on his rights and the issue is now *resjudicata*.

When the matter came for hearing, ***PW1, James Kirwa Ruto*** testified that he is a nurse with the Kenya Red Cross. Alfred Kipruto Tuitoek was his father. He is deceased having died on 29.9.1992. He obtained letters of administration for the Estate of the deceased. The defendant is the son of the late Cheruiyot Kimilot, deceased. According to the plaintiff, his father bought land from the deceased father of the defendant on 13.11.1989 measuring 3½ acres at a consolidation of Kshs.52,500. He paid Kshs.35,000 on the date of the agreement and the balance was paid on 30.12.1989. the entire purchase price was paid. Their father was ploughing the land and that the family has been in open possession. Before the death of their father, there was no dispute. The land is registered in the names of the father to the defendant. He has been planting maize, wheat and oats. He has built a house for a worker.

On cross examination, he states that in 1989, he was 18 years old. The agreement was between his father and the father of the defendant. The land was purchased on 1989 but the house was constructed in 2015.

PW2, Ezekiel Cheruiyot Rotich who stays at Kaptagat Settlement Scheme states that his land Uasin Gishu/Kaptagat/146 neighbours the suit land. He has lived there since 1965. He states that in 1989, the government gave notice to all persons who had loan arrears in respect of Settlement Fund Trustees land. The defendant's father had loan arrears and requested the plaintiff's father to pay the same which he did. They entered into agreement for the sale of the land and the plaintiff's father purchased the land, fenced the same and planted maize every season. He has never heard of any dispute between the parties. Alfred and his family has been utilizing the land. On cross examination, he states that the land was fenced. A structure was put up on the land in 2013. He states that the fence was put up in 1990.

PW3, Simon Kiprono Kiplagat states that he stays at the scheme in Plot No. 144. He knows the parties. Plot No. 150 and Plot No. 144 are

about 600 metres apart. The defendant's father sold the plaintiff's father the land in dispute. The land was fenced in 1990. On cross examination, he states that he did not see the fencing and did not see the agreement. The defendant did not call evidence.

The gravamen of the submissions by Mr. Tororei, learned counsel for the plaintiff is that the plaintiff's father's agreement with the defendant's father was null and void for failure to obtain the consent of the land control board as required by the Law and therefore upon expiry of the period provided for obtaining consent, the plaintiffs became trespassers and therefore upon expiry of 12 years they became entitled to the land by virtue of adverse possession.

The gist of the submissions by Mr. Nyamweya, learned counsel for the defendant is that the plaintiff did not have peaceful and open possession of the suit property is not based on any evidence.

I have considered the pleadings, evidence on record and submissions of the plaintiff and the submissions of the defendant and do find that it is not in dispute that the plaintiff is in possession of the suit land having lived there with his late father until his death on the 29th September, 1992 and thereafter to date. The plaintiff has demonstrated that the occupation or possession has been open, quiet, peaceful and without any interruptions.

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.”

The plaintiff has demonstrated that the family of the deceased Alfred Kipruto Tuitoek has been in open possession of the suit property. The defendants have been aware of the possession but have never attempted to interfere with it. The property is registered in the names of the late Cheruiyot Kimilot. The plaintiff has been residing in the property since 1989. I do find that the plaintiff has proved on a balance of probabilities that he is in adverse possession of the suit property.

The upshot of the above is that the originating summons is allowed. It is hereby ordered that:

a. The defendants/respondents claim/interest to that portion measuring 3.5 acres comprised in that parcel of land known as Uasin Gishu/Kaptagat/150 stands extinguished by lapse of time.

b. That the plaintiff/applicant has obtained title and ownership of that portion of land measuring 3.5 acres or thereabouts comprised in that parcel of land known as Uasin Gishu/Kaptagat/150 by virtue of the Doctrine of Adverse Possession.

c. That pursuant to the foregoing, the Land Registrar, Uasin Gishu County or the Land Registrar currently in lawful custody of the Land Register in respect of land parcel No. UASIN GISHU/KAPTAGAT/150 be ordered to delete the name of Cheruiyot Kimilot from the register and replace with that of the plaintiff James Kirwa Ruto and issue him with fresh title to the portion measuring 3.5 acres comprised in the said land.

Costs to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 5th day of December, 2018.

A. OMBWAYO

JUDGE