



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 271 OF 2013

TABITHA WAITHERERO KIMANI.....PLAINTIFF

VERSUS

JOSHUA NG'ANG'A.....DEFENDANT

JUDGMENT

The plaintiff, *Tabitha Waitherero Kimani* has come to court against the defendant, *Joshua Ng'ang'a* claiming to be entitled to a portion of land parcel No. *Eldoret Municipality Block 16/Kamukunji/190* through adverse possession and for determination of the following questions and for issuance of orders:

- 1. That the applicant Tabitha Waitherero Kimani has obtained title by way of adverse possession over a portion of land parcel No. Eldoret Municipality 16/Kamukunji/190 measuring 60 by 55 feet having taken continuous uninterrupted possession of the portion nec vic ce clam, nec precario without interruption since 1995.*
- 2. The respondent's title over the portion of land reference Eldoret Municipality Block 16/Kamukunji/190 measuring approximately 60 feet by 55 feet has been extinguished by dint of adverse possession, nec vic, nec clam, nec precario, continuously without interruption since 1995.*
- 3. Consequent upon the foregoing, the respondent's title over a portion of land parcel No. Eldoret Municipality Block 16/Kamukunji/190 measuring 60 by 55 feet has been extinguished by operation of law and the same be transferred into the applicant upon being excised.*
- 4. A vesting order do accordingly issue, vesting a portion of land parcel No. Eldoret Municipality Block 16/Kamukunji/190 measuring 60 feet by 55 feet to the applicant, Tabitha Waitherero Kimani.*
- 5. Consequent upon 1,2,3 and 4 being granted the respondent be ordered to execute subdivision and transfer to the applicant, of the portion she has acquired under adverse possession failing which the Deputy Registrar of the Environment and Land Court, do execute the subdivision and transfer documents and the Land Registrar, Uasin Gishu County do issue a fresh title deed in the name of the applicant Tabitha Waitherero Kimani.*

The suit for adverse possession is supported by the affidavit of Tabitha Waitherero Kimani who states that sometime in 1994, she bought a portion of land reference Eldoret Municipality Block 16/Kamukunji/190 measuring approximately 60 by 55 feet. That in 1995, she moved into land reference Eldoret Municipality Block 16/Kamukunji/190 and occupied 60 by 55 feet of land and she has been in occupation of the land since then to-date. That in 1995, she has put up a house on the 60 by 55 feet of

land she occupies on land reference Eldoret Municipality Block 16/Kamukunji/190 and she has been thereon since then. That between 18.9.1989 to 11.9.2000, land reference Eldoret Municipality Block 16/Kamukunji/190 was registered in the name of Geoffrey Waweru Muchina. That on 11.9.2000, the land was transferred into the respondent's name and it is so registered to-date.

That she has peacefully lived on a portion of land reference Eldoret Municipality Block 16/Kamukunji/190 and that her occupation of 60 feet by 55 feet on land reference Eldoret Municipality Block 16/Kamukunji/190 has been open and uninterrupted. The respondent has not managed to evict her nor exert the proprietary right to the portion she occupies on land reference Eldoret Municipality Block 16/Kamukunji/190. The respondent's title to the portion she occupies on land reference Eldoret Municipality Block 16/Kamukunji/190 has been extinguished. That she has acquired title to the portion she occupies by operation of law, adverse possession. She attached the green card (extract of title) and certificate of official search to land reference Eldoret Municipality Block 16/Kamukunji/190 and had them marked TWK 1 and 2. The portion of land she occupies ought to be excised from land reference Eldoret Municipality Block 16/Kamukunji/190 and the title thereto issued to her.

She claims title by dint of adverse possession to the portion she occupies. The respondent has lost the right to claim the land she occupies by virtue of the Limitation of Actions Act as she has been on the suit land for more than 18 years. That she has occupied the suit land since the respondent became its registered owner for more than 12 years. That the court ought to issue a vesting order vesting ownership of the portion of land she occupies to her. The respondent may not voluntarily subdivide and transfer the portion she occupies on land reference Eldoret Municipality Block 16/Kamukunji/190 to her hence the need to have the Deputy Registrar do so.

Joshua Ng'ang'a on his part, states that he is the registered owner of the subject land parcel No. Eldoret Municipality Block 16/Kamukunji/190 measuring 60 by 55 or thereabout and annexed the Title Deed as JN1. That he bought the land parcel No. Eldoret Municipality Block 16/Kamukunji/190 measuring 60 by 55 feet from the late Geoffrey Waweru Muchina on the 19.11.1995. That Tabitha Waitherero Kimani requested him to stay on the said portion of land parcel No. Eldoret Municipality 16/Kamukuni/190 measuring 60 by 55 feet for 2 weeks and now she is claiming to be the rightful owner of his land. That respondent and the applicant were summoned on two occasions by the area Chief Kibulgeny location to solve the said land dispute but she refused to attend. According to Ng'ang'a, the applicant is not being sincere by stating that he has not been able to evict her since she never attended the two (2) meetings at the chief's office. That if it is true that the applicant bought a portion of land reference Eldoret Municipality 16/Kamukunji/190 measuring approximately 60 by 55 feet then she ought to show the Honourable court the sale agreement she entered with the seller. The prayers sought by the applicant should not be granted since he has tried to evict her but she has refused to vacate the portion of land No. Eldoret Municipality Block 16/Kamukunji/190 measuring approximately 60 by 55 feet or thereabout.

When the matter came for hearing on 7.6.2016, the plaintiff testified that she stays in Eldoret in Kamukunji and is engaged in life as a businesswoman. That she occupies 60 by 55 square feet on land reference Eldoret Municipality Block 16/Kamukunji/190 and she has been in continuous occupation thereof since 1995. That the ownership of the suit land was transferred to the respondent in the year 2000. That she started occupying the land because she had purchased a portion thereof and that her occupation of the land has been open and adverse to the respondent's interest. That she has developed the land by putting up a semi-permanent house, toilet and a kitchen. That she has fenced it and installed electricity and water thereon. That her occupation of the land has been without the respondent's permission. That the respondent found her on the land she occupies when he moved into the portion he occupies. She prays that the land she occupies ought to be transferred to her. That she has used the portion without permission for over 20 years and also prays for costs of the case.

PW2, Esther Wanjiro Alando states that she is a resident of Kamukunji Estate, Eldoret town and she is the owner of land reference Eldoret Municipality Block 16/Kamukunji/188. Joshua Ng'ang'a and Tabith Waitherero Kimani are her neighbours. Tabith and Joshua reside on land reference Eldoret Municipality Block 16/Kamukunji/190. Tabitha occupies 60 by 55 feet while Joshua occupies the rest land reference Eldoret Municipality Block 16/Kamukunji/190. Each of the 2, occupies a distinct portion of the same

parcel of land.

That she started occupying land reference Eldoret Municipality Block 16/Kamukunji/188 way back in the 1970s. Tabitha found her at Kamukunji when she moved into land reference Eldoret Municipality Block 16/Kamukunji/190 in 1995. She had done development thereon by building a semi-permanent house, a toilet, a kitchen and fenced the land.

That she has also installed electricity and piped water on the land. Tabitha did not start occupying the land with permission from Joshua Ng'ang'a. That the plaintiff has used the portion she occupies for 20 about years now.

Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely: -

(A) OPEN AND NOTORIOUS USE OF THE PROPERTY. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

(B) CONTINUOUS USE OF THE PROPERTY – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

(C) EXCLUSIVE USE OF THE PROPERTY – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

(D) ACTUAL POSSESSION OF THE PROPERTY – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

I do find that the plaintiff has established that was in open and notorious use of the suit property even before the defendant bought the land and caused the same to be transferred to him and is still in possession and therefore continuous use of the property to the exclusion of the defendant and has actual possession of the property and therefore has satisfied the principles of adverse possession as she has developed the land by building a semi-permanent house, a toilet, a kitchen and fenced the land. It is not controverted that she has also installed electricity and piped water on the land. Ultimately, the suit is allowed. Consequently, judgment is Judgment is entered for the plaintiff in the following terms:

1. That the applicant Tabitha Waitherero Kimani has obtained title by way of adverse possession over a portion of land parcel No. Eldoret Municipality 16/Kamukunji/190 measuring 60 by 55 feet having taken continuous uninterrupted possession of the portion nec vic ce clam, nec precario without interruption since 1995.

2. The respondent's title over the portion of land reference Eldoret Municipality Block 16/Kamukunji/190 measuring approximately 60 feet by 55 feet has been extinguished by dint of adverse possession, nec vic, nec clam, nec precario, continuously without interruption since

1995.

5. Consequent upon the foregoing, the respondent's title over a portion of land parcel No. Eldoret Municipality Block 16/Kamukunji/190 measuring 60 by 55 feet has been extinguished by operation of law and the same be transferred into the applicant upon being excised.

4. A vesting order do accordingly issue, vesting a portion of land parcel No. Eldoret Municipality Block 16/Kamukunji/190 measuring 60 feet by 55 feet to the applicant, Tabitha Waitherero Kimani.

5. Consequent upon 1,2,3 and 4 being granted the respondent be ordered to execute subdivision and transfer to the applicant, of the portion she has acquired under adverse possession failing which the Deputy Registrar of the Environment and Land Court, do execute the subdivision and transfer documents and the Land Registrar, Uasin Gishu County do issue a fresh title deed in the name of the applicant Tabitha Waitherero Kimani.

Costs of the suit to be borne by the respondent. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE