



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 45 OF 2017

EBBY MINAYO MUNGASIA.....PLAINTIFF

VERSUS

SHADRACK MACHARIA MWANGI.....1ST DEFENDANT

JOSEPH KOROS.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

By a plaint dated 8th February 2017 the plaintiff sued the defendant for:

- a. An eviction order against the 2nd Defendant and his representatives or assigns.
- b. A permanent injunction against the 1st and 2nd Defendants or there representative or assigns against trespassing or encroaching into the said land.
- c. Court Order to issue compelling the District Land Registrar Uasin-Gishu to remove a caution registered against the title by the 1st Respondent.
- d. Mense profit
- e. General damages
- f. Special damages
- g. Costs of suit
- h. Interest on (d) (e) and (f) above at court rates.
- i. Any other order that the court deems fit to grant.

This matter came up for hearing on 5th April 2017 which date was taken by consent of both Counsels for the plaintiff and the defendant. When the matter was called out, both the plaintiff and her Counsel were absent. The Defendant's Counsel urged the court to dismiss the plaintiff's suit with costs and allow them to proceed with their counterclaim.

The defendants having been served with the pleadings, application and order entered appearance and filed a defense and counterclaim. The first defendant also filed authority to depone, act, testify and plead on behalf of the 2nd defendant. The pre-trial directions were taken and the defendant filed statement of issues.

Defendant's Case

It was the defendant's case that the suit parcel of land known as UASIN GISHU/LELMOKL/15 measuring 2.3 Hectares belonged to the late Mary Njeri Mwangi who died on 30th May 1989 and upon her death the property vested in her estate as it was to be subject and control of her personal representatives in accordance with section 82 of the law of Succession Act.

The 1st defendant adopted his witness statement filed in court as evidence before the court. The defendants sought the following reliefs in the counterclaim:

1. A declaration that the plaintiff's registration as the proprietor of the land parcel known as **UASIN GISHU/LELMOLK/15** is a nullity, was obtained fraudulently and is unlawful coupled with an order cancelling the title and the registration of the plaintiff and substituting thereof the personal representative of the estate of the deceased Mary Njeri Mwangi – deceased.
2. A declaration that the plaintiff's title to the land parcel known as **UASIN GISHU/LELMOLK/15** has been extinguished pursuant to section 38 of the **Limitation of Actions Act**, Cap. 22 of the Laws of Kenya and they be registered as the proprietors of the suit land in place of the plaintiff by virtue of the adverse possession.
3. Costs of the suit and counter-claim.

The defendant testified that he filed a Succession cause whereby he was granted letters of administration dated 17th February 2003. He produced the letters of administration which was marked as exhibit 1. The defendant also testified that as at 2/7/92 the suit land belonged to Settlement Fund Trustee. The land was later transferred to Ebby Minayo the plaintiff herein after the death of Mary Njeri Mwangi. The defendant stated that he lodged a caution on the suit land on 7/5/03 and produced an extract of the green card which was marked as exhibit No. 2. The defendant further testified that the late Mary Njeri was sent rates demand notice dated 24/7/89 and another one on 10/5/03 which he produced as exhibit Nos. 3 and 4 respectively. The defendant also stated that a rates waiver letter was sent to Mary Njeri on 14/5/03 and the same was produced as exhibit no. 5. He testified that he had lodged a caution on the land and did not know how the plaintiff got the title to the suit land. He was not given a notice to remove the caution by the Registrar. The defendant further stated that they stay on the suit land where they plough and have built houses thereon. The 2nd defendant started residing on the suit land in the year 2004. The defendant stated that they have been in open, without the plaintiff's consent, continuous, uninterrupted occupation of the suit land.

It was the defendant's evidence that on 20/2/17 they carried out a valuation through Highland Valuers who established that the land is worth 3.8million shillings. The valuation report was produced as exhibit 6 before the court which showed houses, trees and a borehole dug by the defendants. The defendant prayed that the title deed in the plaintiff's name be cancelled and be registered in his name plus costs of the suit.

Defendant's Counsel's Submission.

Counsel for the defendant filed written submissions on 26th April 2017 in support of the defendant's case. He submitted that the Director of Land Adjudication could not allocate the plaintiff the property of a deceased person without having given notice to the estate of the deceased or the personal representative(s). He further submitted that no communication of the revocation of the offer made to the deceased was ever given to the estate or the personal representative(s) prior to allocation of the land to the plaintiff.

It was Counsel's submission that the land was never vacant for it to qualify for allocation, since the defendants were in occupation and also that the **Land Adjudication Act**, Cap. 284 does not grant powers of re-allocation of the land that had already been granted to another person and which was the subject of the land adjudication.

Counsel further submitted that evidence of fraud was manifested by the fact that the plaintiff obtained a charge from the Settlement Fund Trustees for Kshs. 14,000 on the 23rd, December, 2002 and obtained a discharge of charge on the same day being the 23rd December, 2002. He stated that the plaintiff neither paid stamp duty nor settlement fees and other levies due.

It was submitted by Counsel that the plaintiff's suit was equally time barred as if at all she obtained title on 23/12/2002 she had no justification to file suit for eviction of the defendants on the 8/2/2017 which is 15 years later. Counsel also submitted that the action for removal of the caution was time barred and that if the caution was to be deemed to be wrongful, the same would have entitled the plaintiff to seek relief based on tort. The caution was lodged on 7/5/2003 while the suit was filed on 8/2/2017 about 14 years later. It was submitted that there was no evidence to show that the government had ever demanded payment from the deceased and she willingly failed to pay.

Issues, analysis and determination

The defendant filed statement of issues on 28th March 2017 whereby he listed 6 issues.as follows:

- a. Whether the plaintiffs' title to the land parcel known as UASIN GISHU/LELMOLK/15 was obtained lawfully, legally and without fraud?
- b. Whether the defendants have overriding interests to the land?
- c. Whether the plaintiff's suit is time barred under the Limitation of Actions Act, Cap. 22?
- d. Whether the defendants have acquired title to the land by adverse possession?
- e. Whether the parties are entitled to the reliefs sought?
- f. Which order should be made on costs?

In my view, the issues for determination in this case are very simple. I will compress the issues to three as follows.

- a. Whether the defendants have acquired title to the land by adverse possession?
- b. Whether the plaintiff acquired the suit title fraudulently?
- c. Who should pay the costs of the suit?

The defendants had listed an issue as to whether the title to the suit land was obtained by the plaintiff legally without fraud. Counsel submitted that the fact that the transactions for discharge of charge and registration of the plaintiff was done on the same day was fraudulent.

The defendants did not lead any evidence to prove that the plaintiff fraudulently acquired the suit title. There was nothing wrong with the discharge and registration of the plaintiff as a proprietor on the same day if she had fulfilled all the requirements and procedures. If the defendant suspected fraud, he could have called the Land Registrar to ascertain the same or shed light to the court. This was never sought. Mere allegation of fraud without proof is not helpful to the parties or the court.

The case relied on by Counsel, **ELC NO. 51 of 2014 Alice Chemutai Too Vs Nickson Kipkurui Korir**

& 2 Others does not help the defendant's case as it requires the person who alleges fraud to prove that the title holder was party to the fraud or misrepresentation. This was not done in the present case. Counsel further submitted that upon studying the title deed closely that it demonstrated evidence of fraud. Counsel is neither a document examiner nor a witness in the case. He cannot be heard to state such from the bar. I therefore find that the allegation of fraud has not been proved therefore it fails. If this allegation that the plaintiff obtained the title to the suit property by fraud was proven, then this would have been a ground for cancellation. Section 26 of the Land Registration Act 2012 provides

26. (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 issue as to whether the defendants have acquired the title to the suit land by way of adverse possession is the gist of this case. The law on adverse possession is now settled.

Adverse Possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by state law. The prescribed period under the Limitation of Actions Act Cap 22 of the laws of Kenya is 12 years.

According to Halbury's Laws of England, 4th Edition, Volume 28, paragraph 768,

' no right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run'.

Time begins to run when the true owner ceases to be in possession of his land. Dispossession occurs when the acts done are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it, thus the term "adverse".

Section 38(1) of the Limitation of Actions Act provides that where a person claims to have become entitled by adverse possession to registered land, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land.

Order 37 Rule 7 of the Civil Procedure Rules, 2010 on the other hand provides that an Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons and the summons shall be supported by an affidavit to which a certified extract of the title of the land in question has been annexed.

The defendants in their counterclaim did not file an affidavit as envisaged under order 37 Rule 7 of the Civil Procedure Rules to support an application under section 38 of the Limitation of Actions Act. The replying affidavit was in respect of an application by the plaintiff dated 9th February 2017 for an injunction. The defendant did not seek for any directions as to how they would have wanted the matter to proceed. The parties indicated to the court that they had complied with order 11 of the CPR 2010 and requested for a hearing date. Even though the defendant produced an extract of the title which is registered in the plaintiff's name, this was not enough to prove adverse possession. Be it as it may, the power of the court to do substantive justice is today wider than before. Courts have overlooked technicalities to arrive at decisions. Even if the court was to overlook this technicality on form and procedure, the defendants would still have an uphill task to prove that they have acquired the land through adverse possession.

The defendant also adduced evidence that as at 2nd July 1992 the suit land was registered in the name of Settlement Fund Trustee. Land registered in favour of the Settlement Fund Trustees with a view of allocating it to allottees and then charging it is and remains public land until a title deed is issued to an allottee. The deceased died on 30th May 1989. It is evident that the late Mary Njeri died when the suit property was in the name of the Settlement Fund Trustee. From the evidence on record there is nothing to show that she had acquired any title to the suit property in any way. There is also no proof that she had fulfilled the conditions of the allotment if at all she had been allocated the suit plot. The rates demand notices to the Late Mary Njeri did not prove that the property had accrued to her. One of the demands dates back to 1989 when the property was still in name of SFT. There was no proof of payment of the rates demanded. There is a tendency of records not being updated even after changes have occurred. Further the valuation report that was produced by the defendants indicates that the client was Ebby Minayo who is the plaintiff herein. The report indicated that the property is fenced by barbed wire and has semi-permanent structures whose value was ignored for purposes of the valuation report. This shows that the improvement was insignificant. It did not mention the borehole that the defendant had alluded to.

The 1st defendant who gave evidence on behalf of the 2nd defendant did not adduce evidence to state how the 2nd defendant was linked to the case. He just stated that he started occupying the suit land in 2004 but did not state in what capacity. He is neither a son nor a relative of the deceased Mary Njeri. It was incumbent upon the defendants to prove that they were using the suit land in a manner that was inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. For a claim of adverse possession to succeed, the claimant must prove the above element. I find that the defendants have failed to prove that they have acquired the suit land by adverse possession.

On the issue, as to whether the plaintiff's suit is time barred or not, I will not apply my mind to it having been dismissed for want of prosecution on the onset.

I therefore find and hold that the defendants have not proved on a balance of probabilities that they acquired the suit land by way of adverse possession.

The upshot is that the defendants' counterclaim is hereby dismissed with no orders as to costs.

Dated and delivered at Eldoret on this 14th day of June, 2017.

M.A ODENY

JUDGE