REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 140 OF 2012

MOSES CHEPKONGA CHERONO …….. PLAINTIFF

VERSUS

MARGARET NJOKI KINYANJUI……..…DEFENDANTS

JUDGMENT

1. Proceedings herein were commenced by way of Originating Summons dated 27th March 2007 brought under the then Order XXXVI Rules 3 and 5 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act. The relief sought in the Originating Summons is:

> *That the honourable court be pleased to make a declaration to the effect that the applicant herein is the lawful owner of land parcel number 107 Kampi ya Samaki*

2. The Originating Summons is supported by an affidavit sworn by the plaintiff/applicant on 27th March 2007. The defendant/respondent responded to the Originating Summons through the respondent's replying affidavit sworn on 23rd May 2007 and filed in court on 25th May 2007. Subsequently directions were taken on 20th February 2008 and on 3rd April 2014 that the matter would be heard by way of *viva voce* evidence, that the originating summons be deemed as plaint and that the replying affidavit be deemed as defence.

3. The plaintiff's case is summoned up in the grounds of the originating summons as follows:

> *1. THAT the applicant purchased land parcel number 107 Kampi ya Samaki from respondent.*
>
> *2. THAT the applicant is in possession of the said land parcel since 1992 and also the original allotment letter handed over to him by the respondent.*
>
> *3. THAT the applicant has also developed the said parcel of land by building residential houses therein.*
>
> *4. THAT the respondent has reneged on her agreement with the applicant and now claims back the land parcel from the applicant.*
>
> *5. THAT the respondent did apply to transfer the said land parcel to the applicant and even signed the transfer application form but later declined to appear before the County Council Committee to formerly [sic] effect the transfer.*
>
> *6. THAT the respondent's actions are prejudicial to the applicant and hence the need for the Court*

to make a declaration as to the ownership of the said land parcel

On the other hand, the defendant's case as captured in the replying affidavit is as follows:

7. THAT this suit was instituted with a view to availing a defence to the plaintiff in NAKURU CMCR NO. 1559 OF 2006 REPUBLIC VS MOSES CHEPKONGA CHERONO in which the plaintiff was charged with the offence of forcible detainer contrary to section 91 of the Penal Code.

9. THAT the plaintiff had at one time deposited some money with me with an intention to purchase the suit parcel of land but at his instance (through his advocates), the money was refunded. Annexed hereto and marked "MNKI" is a copy of a letter dated 12th September 1995 from the plaintiff's advocates.

10. THAT following the position taken by the plaintiff with regard to the refund, the entire deposit was returned to the plaintiff through his advocates. Annexed hereto and marked "MNKII" is a copy of a receipt No. 728 dated 30th June 2000.

11. THAT all through before the refund, the plaintiff occupied the suit land with my consent.

12.*THAT after the refund, the plaintiff kept on promising to move out of the land but when I realized that he was not willing to do so, I instituted the criminal case.*

13. THAT as such, the plaintiff's suit is premature and cannot stand as the period within which the provisions of the law being invoked by the plaintiff became operational had not started to run.

14. THAT in any case it is clear from the pleadings that the plaintiff is seeking to enforce the redundant agreement through the present suit.

15. THAT the plaintiff had constructed some temporary structures on the land but the same were to be removed once the refund was made. Annexed hereto and marked "MNKIII" are copies of the photographs showing the structures.

16. THAT in any event the plaintiff developed the land at his own risk as he knew very well that he was in occupation at my pleasure.

4. At the hearing only the plaintiff testified and thereafter plaintiff's case was closed. The defendant did not offer any evidence, choosing instead to close her case and proceed on to submissions. The plaintiff testified that was informed that the defendant was selling a plot. He went to see the defendant on 11th December 1992 at Marigat. The two of them met and agreed on a purchase price of KShs 21,500 for the plot which was at Kampi ya Samaki. The plot number was 107. He further testified that since he did not have cash, he went back home. He later sent the defendant KShs 19,000 on 14th December 1992 through Joseph Chebet. He went back to see the defendant on 18th December 1992 and paid her Ksh.2,000. The balance of Ksh 500 was to be paid upon transfer. They later went to the County Council and were issued with a form called "Application for Transfer of Plot in Urban Centres" for which they paid Ksh.100. He produced a copy of the filled form as well as a copy of the receipt as exhibits. He further testified that the defendant gave her the allotment letter and that upon taking possession he constructed a two roomed stone house. That he is still in occupation.

5. Under cross examination the plaintiff stated that he entered the plot in 1992 with the permission of the defendant and that he still remains on the plot with her permission. He further testified that the Ksh.21,000 which he had paid was returned to her lawyers and that on 10th November 1993 the defendant wrote to him stating that he owed her Ksh.4,500 being balance of the purchase price. He did not pay her the money.

6. Parties opted to file written submissions at the conclusion of the oral testimony. In his very brief written submissions counsel for the plaintiff submitted that the plaintiff bought the suit property from the defendant at an agreed purchase price of Ksh.21,500 in around December 1992 out of which he paid Ksh.21,000 leaving a balance of Ksh.500 which was to be paid upon formal transfer of the suit property to the plaintiff at the County Council. That the defendant unconditionally put the plaintiff in possession of the suit premises and authorized him to construct thereon. Regarding the suggestion that the purchase price had been refunded to the plaintiff's advocates counsel submitted that the plaintiff's consent was not sought prior to the refund and that the plaintiff had not received the funds said to have been refunded. In conclusion, counsel submitted that balance of probabilities tilted in favour of the plaintiff. Counsel did not however indicate to the court what relief the plaintiff wished to be granted in the circumstances.

7. Counsel for the defendant submitted that there was no written sale agreement capable of enforcement in view of the provisions of section 3(3) of the Law of Contract Act. Counsel further submitted that the plaintiff had failed to establish the ingredients of adverse possession and that in any case the claim for adverse possession was not properly instituted since no extract of title was produced. The defendant thus urged the court to dismiss the case.

8. I have considered the pleadings filed by the parties herein, the evidence adduced and submissions. From the plaintiff's evidence in Chief as well and cross examination, there is no dispute that the plaintiff and the defendant entered into a transaction sometime in the year 1992 pursuant to which the plaintiff was to buy plot No. 107 Kampi ya Samaki at Ksh.21,500/=. The plaintiff paid a total of Ksh.21,000/= but this amount was later returned to the plaintiff's advocates. The plaintiff however maintains that he did not receive the money from the advocates.

9. The plaintiff's claim is essentially one of adverse possession. Ingredients of adverse possesion were discussed by the Court of Appeal in **Mtana Lewa v Kahindi Ngala Mwagandi [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 or 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."***
>
> **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."

10. In a claim in the nature of adverse possession, it is indispensable that an extract of title be produced by the plaintiff. In **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR** the Court of Appeal stated as follows:

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3 D(2) of order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons. In this case, the appellant did not annex the certified extracts of land title LR Nos 1756 and 1757 before the sub-division or even after the sub-division. ..... The burden was on the appellant to produce the certified extracts of title in respect of the suit properties.

11. I have read the affidavit in support of the Originating Summons. There is no certified extract of the title to the land in question annexed. I have seen a copy of a letter of allotment annexed. A letter of allotment is however not evidence of title. Order XXXVI rule 3 D(2) of Civil Procedure Rules which was in force as at the date of filing of the originating summons herein was couched in mandatory terms. Consequently, failure to annex a certified extract of the title to the land is fatal to the plaintiff's claim.

12. What about the other requirements necessary to establish adverse possession? The possession of the adverse possessor ought to be continuously for at least 12 years and ought not be under the licence of the owner. In the present case the plaintiff testified that he came onto the land with the permission of the defendant and pursuant to a sale transaction. He clearly had the permission of the defendant to enter the property. In such circumstances the plaintiff cannot qualify to adverse possessor.

13. It is also noteworthy that in the year 2006, before this suit was instituted, the plaintiff was charged in relation to the property with the offence of forcible detainer contrary to section 91 of the Penal Code in NAKURU CMCR NO. 1559 OF 2006 REPUBLIC VS MOSES CHEPKONGA CHERONO.

14. From all the foregoing, it is clear that the plaintiff's claim cannot succeed. It is dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kipkenei for the plaintiff

Ms. Amulabu holding brief for Ms. Gitau for the defendant

Court Assistant: Gichaba