



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 2 OF 2013

JOHN IMBAIZA VODOYE.....PLAINTIFF

VERSUS

ANN CHEBET.....1ST DEFENDANT

PAUL CHEPKWONY.....2ND DEFENDANT

JUDGMENT

John Imbaiza Vodoye, (hereinafter referred to as the plaintiff) has come to court against Ann Chebet and Paul Chepkwony asserting that he is the registered owner of all that parcel of land known as Nandi/Kiminda/896 measuring 1.72 hectares having acquired title in the year 1983. That the defendants, their servants, agents and or employees have without any lawful justification and or reason encroached onto the plaintiff's parcel of land Nandi/Kiminda/896 and have refused to move away therefrom. The defendants, their servants, agents and or employees encroached onto the plaintiff's land parcel since the year 1995 making it impossible for the plaintiff to make use of the land.

The plaintiff's claim against the defendants in for a declaration that the defendants are trespassers onto the land parcel Nandi/Kiminda/896 and that the plaintiff is the legal owner of all the parcel of land known as Nandi/Kiminda/896. The plaintiff prays for an eviction order evicting the defendants, their servants, agents and or employees from land parcel Nandi/Kiminda/896. That upon the defendants vacating land parcel Nandi/Kiminda/896, the plaintiff prays for an order of permanent injunction restraining the defendants from trespassing into the plaintiff's land parcel Nandi/Kiminda/896 and or in any other way interfering therewith. That the plaintiff also prays for mesne profits from the year 1995 when the defendants entered the suit land until judgment is delivered.

The defendants filed a defense and counterclaim denying that the plaintiff is the registered owner of all that parcel of land known as Nandi/Kiminda/896 measuring 1.72 hectares or at all or that the plaintiff acquired the title of the said parcel of land in the year 1983 and calls the plaintiff to strict proof thereof. The defendants deny the entire allegations in paragraph 4 of the plaint especially that the defendants, their servants and/or his employees have without any lawful justification and/or reason encroached onto the plaintiff's parcel of land Nandi/Kiminda/896 and have refused to move away there from and/or at all or that the said parcel of land belongs to the plaintiff and the plaintiff is invited to strict proof thereof. The defendants in answer to paragraphs 5 of the plaint aver that they have lived in the parcel of land Nandi/Kiminda/896 since the year 1975 when the same was bought by his family. That the allegations contained in paragraph 5 of the plaint is denied in toto and the plaintiff is invited to strict proof. The defendants deny in toto the contents of paragraph 6 of the plaint and aver that he is not a trespasser on the said parcel of land Nandi/Kiminda/896 or at all or that he is not the legal owner of the land Nandi/Kiminda/896 and calls the plaintiff to strict proof thereof. The defendants in answer to paragraph 7 of the plaint aver that an eviction order ought not issue against them as they have acquired adverse

possession having been in occupation and possession on the said land Nandi/Kiminda/896 for over 35 years peacefully, open and uninterrupted until January, 2013.

That the defendants in answer to paragraph 8 of the plaint aver that they have never been trespassers on their own land and an order of permanent injunction restraining them from accessing their own land ought not issue. The defendants shall be praying instead for an order of permanent injunction to issue against the plaintiff from interfering with the 1st defendant's quiet possession and enjoyment of his land Nandi/Kiminda/896.

The defendants deny the contents of paragraph 9 of the plaint and aver that they have been in occupation of the said land since 1975 having bought the same, occupied and have been in possession peacefully open and uninterrupted until January, 2013. Any claim of mesne profit or otherwise by the plaintiff is therefore denied and the plaintiff is invited to strict proof. The defendants in answer to paragraph 10 of plaint deny that Demand and Notice of Intention to sue has been issued to him and calls the plaintiff to strict proof thereof.

The defendant's counterclaim is for a declaration that he is the legal owner of all that land known as Nandi/Kiminda/896 by dint of adverse possession and a land title do issue to the defendants and that the said land Nandi/Kiminda/896 was bought by his late father Philip Arap Marindany from Mr. Malakwen Arap Chemwor on the 30th April, 1975. The defendants aver that they have been in occupation, possession and use of the whole of land parcel No. Nandi/Kiminda/896 since 1975 and that since 1975 to January, 2013 which is over 35 years, their occupation has been peaceful, open and uninterrupted by the plaintiff or anybody until January, 2013. The defendants further aver that the plaintiff's rights over the land Nandi/Kiminda/896 if any, at all, and which has been and is denied, have been extinguished by effluxion of time and that the 1st defendant be declared the owner of land parcel No. Nandi/Kiminda/896 and a land title do issue in favour of the 1st defendant.

The defendants specifically pray that the plaintiff's suit be dismissed with costs. A declaration that the defendants are the legal owner of all that parcel of land Nandi/Kiminda/896 by dint of adverse possession and a Land Title to issue in favour of the defendants and a permanent injunction restraining the plaintiff, his agents, servants or employees from entering, trespassing or interfering with the land parcel No. Nandi/Kiminda/896. Cost and interest of the counterclaim.

The plaintiff testified that he is the registered owner of all that parcel of land known as Nandi/Kiminda/896 measuring 1.72 hectares having acquired the title in the year 1983. That the defendants, their servants, agents and or employees have without any lawful justification and or reason encroached into his parcel of land Nandi/Kiminda/896 and have refused to move away therefrom. That he claims against the defendants for the declaration that the defendants are trespassers into his land parcel Nandi/Kiminda/896 and he is the legal owner of all that parcel of land known as Nandi/Kiminda/896. That he prays for an eviction order evicting the defendants, their servants, agents and or employees from land parcel Nandi/Kiminda/896. That upon the defendants vacating land parcel Nandi/Kiminda/896, he also prays an order of permanent injunction restraining the defendants from trespassing into his land parcel Nandi/Kiminda/896 and or in any other way interfering therewith.

According to the plaintiff, the defendants, their servants, agents and or employees encroached into the land in the year 1995 making it impossible for him to make use of the land. He prays for mesne profits from the year 1995 when the defendants entered the suit land until when judgment is delivered. He further prays for costs of the suit.

On cross examination by Kirwa, the plaintiff confirmed that he has never been in the land and that the house on the land was constructed by the defendants and that the tree on the land was planted by the defendants. He states that the defendants entered the land in 1995. He has not allowed anybody to enter the land.

The 1st defendant testified that she got married to Paulina Taplektoo Sioror in 1983. That the suit land is

hers and that she has lived on it for so many years and was left to her by her late husband. Her husband bought it sometime in 1975. She got her first-born child in 1984 while living on the same land. That she now has seven children, who were all born on the said land. Since she moved on the said land in 1983, she has never had any dispute touching on this land with the plaintiff until she was served with the court documents in 2013. She just knew their land as Number Nandi/Kiminda/550 as was bought by her late husband.

She got to know of the plaintiff's and subdivision of the said land when she did search and visited Ardhi House, Kapsabet. She has lived on this land continually and uninterrupted for over 25 years. The allegation by the plaintiff that they came to the land in 1995 is not true. She knows the land is hers as her late husband left it for her and she has in any case acquired it through adverse possession. She has done so many developments and improvements on it. She was not a party to the Civil Suit Number 100 of 1976. She prays that the court declares her the owner of this land and issue her with the land title since the same was acquired by her family legally and she is advised by her advocates on record that she subsequently acquired the same by way of adverse possession. That she stands to suffer together with her family if eviction orders are issued against her.

The 2nd defendants testified that Paulina Taplektoo Sioror was his father. That the suit land is his. That he has lived on it for so many years and was left to him by his late father. His father bought it sometime in 1975. He is married with children who were all born on the said land. He has never had any dispute touching on this land with the plaintiff until when he was served with the court documents this year. He just knew their land as Number Nandi/Kiminda/550 as was bought by his late father. He got to know of the plaintiff's and subdivision of the said land when he did search and visited Ardhi House, Kapsabet. That he has lived on this land continually and uninterrupted for over 25 years and have always known the land to be his and was left to him by his late father. That he has done so many developments and improvements on it and that he was not a party to the Civil Suit No. 100 of 1976. That he wishes the court to declare him the owner of this land and issue him with the land title since the same was acquired by his family legally and he is advised by his advocates on record that he subsequently acquired the same by way of adverse possession. That he stands to suffer together with his family if eviction orders are issued against him.

DW3 and DW4 are Christopher Kiplangat Bore and Bernard Rotich Kiptenai respectively. Christopher Kiplangat Bore states that the late Paulina Taplektoo Sioror was his aunt. That he lived with her since his birth in 1954 in Longisa Division in Bomet District. She was married to the late Sioror. She was unable to get children as she was barren. In 1971, due to her inability to bear children, she married vide the Kipsigis customary. In Kipsigis customs, an old woman who is unable to bear children can marry a young girl in order to bear her children for care and inheritance purposes. (Surrogate in English). In 1971, she married Raeli the mother of Paul Kiprotich Chepkwony. In 1972, she married her 2nd wife called Elizabeth Maridany. In 1975, she sold her land in Bomet and purchased the land now in dispute from Mr. Malakwen. From Bomet, she came with her nephew by the name Philip Maridany who assisted her in purchasing the said land. The sale agreement was written in the name of Philip Maridany. She lived on the land since 1975 and in fact developed it. Her children were born on this parcel of land. In 1983, he came from Bomet to witness her third wedding to Ann Chebet Mosonik in accordance with the Kipsigis customs. In 1983, she became sickly all through and passed on in 1998. She left behind her three wives which include Ann Chebet and children which includes Paul Chepkwony and Paul Kipkwon. They have lived on this suit land since birth. There has never been any suit or dispute touching on this land and involving the parties herein from 1975 to 2013 when the defendants were served with complaints and summons to enter appearance. The defendants have lived on this land for so many years continuously, in peace and without any interruptions and he is surprised that someone wants to evict them. They have no other home as the land now in dispute is their own and in fact have developed and planted tea on it.

Bernard Arap Rotich states that he knows the defendants herein and the history of the land now in dispute. That he was a witness towards the purchase of the land now in dispute which was registered at the time as Nandi/Kiminda/550. The land was bought by Sioror. The land was sold to her in 1975 by one Mr. Malakwen. Ann Chebet was the wife of Sioror and Paul Kipkwon and Paul Chepkwony were the sons of Sioror. He was the village elder of Kiropgei, a village within Kiminda sublocation from 1974

until his recent retirement. There has never been any dispute on this land between the parties to this suit; no case was ever reported to him. The land does not belong to the plaintiff. The defendants have lived on this land for so many years without any interruptions. The plaintiff has never been a resident of Kiminda.

Nyebute Kuto states that he was a village elder of Tirop Tet village, Kiminda sublocation for over 30 years. He is now 75 years of age. He knows Arap Chemwor, he was the owner of land parcel No. Nandi/Kiminda/550, which he later on sold to Sioror in 1975. Philip Maridany was the Kin of Sioror. Chebet Ann was the wife of Sioror. Paul Chepkwony and Paul Kipkwony were the children of Sioror. The plaintiffs were never sold any land by Malakwen. He knows the defendants as the owners of the land now in dispute having inherited from their late father and lived on it for over 30 years. For all the years he has been in this village now for over 35 years, he is not aware of any dispute touching the land now in dispute; the plaintiff has never been a resident of Kiminda. The defendants have lived on it peacefully and uninterrupted for so many years. The land he confirms belongs to the defendants.

John Kiprotich Birech states that he knows the defendants herein and the history of the land now in dispute. He was a witness towards the purchase of the land now in dispute which was registered at the time as Nandi/Kiminda/550. The land was bought by Sioror. The land was sold to her in 1975 by one Mr. Malakwen. Ann Chebet was the wife of Sioror and Paul was the son of Sioror. He was the village elder of Kiropgei, a village within Kiminda sublocation from 1974 until his recent retirement. There has never been any dispute on this land between the parties to this suit; no case was ever reported to him. The defendants should not be evicted as the land belongs to them. The land does not belong to the plaintiffs. The defendants have lived on this land for so many years without any interruptions. The plaintiff has never been a resident of Kiminda.

The plaintiff submits that the defendant has no legal right over the parcel of land as he is the registered owner. According to the plaintiff, the defendants have without legal cause and justification and/or reason been in occupation of the parcel of land and refused to vacate the land. The plaintiff submits that the plaintiff's occupation has been by force and not peaceful. According to the plaintiff, adverse possession has not been proved as the plaintiff was evicted from the parcel of land. The defendants submit that the counterclaim is wrong in law as the defendants should have filed an originating summons.

The defendants on the other hand submits that the plaintiff's suit is statute barred by dint of section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. Further, the defendants submit that they have been in actual, open, peaceful, uninterrupted and continuous possession of land parcel number Nandi/Kiminda/896 for more than 12 years and therefore, their claim for adverse possession is legitimate.

On whether a claim based on adverse possession can be brought by way of a counterclaim, the defendants submit that the plaintiff's argument that the format is wrong is a technicality that has been supposed by Article 159 of the Constitution. The defendant submits that the reliefs sought by the defendant can be issued as they are based on law thus; section 38 of the Limitation of Action Act. The defendant submits that he has proved his case on balance of probabilities.

DETERMINATION

I have considered the evidence on record and do find that it is not disputed that the plaintiff is the registered owner of the suit property. However, the suit land has been in the possession of the defendants since 1976 according to Kiptenai Arap Rotich, the village elder. There has never been a dispute on the land on which the defendants have lived for so many years. The plaintiff has never lived on the suit land according to the village elder. Kiptenai Arap Rotich and Nyebute Kuto both state that the land belonged to Chemwor who sold it to Sioror, the 1st defendant's husband. I do believe Mr. John Kiprotich Birech who was a witness in the purchase that the land was bought by Sioror from Chemwor. Sioror was the husband to Ann Chebet and father to Paul Chepkwony. The plaintiff has not established that he was violently evicted from the land but concedes that he did not permit the defendants to enter the land. He has not sued the defendants' other than this suit which was commenced in 2013.

This court finds that the defendants having entered the suit land in 1975, the suit herein fails as it is time barred. Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides that actions to recover land 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.

On the other hand, the defendants have filed a counterclaim based on adverse possession. The plaintiff argues that the counterclaim is not the proper format to commence a claim based on adverse possession. He cites the Civil Procedure Rules Order 37 and the decision of the civil procedure rules that provide that the action ought to be commenced by way of Originating Summons. This court finds that the counterclaim cannot be defeated by the format of the claim as this is a mere technicality. Article 159 of the Constitution of Kenya, 2010 gives this court a discretion not to put undue regard to procedural technicalities. The court is required to consider substantive justice. I do find that the issue raised by the plaintiff on format is a procedural technicality that does not resolve the dispute. Having found that the plaintiff's claim is time barred, I do turn to whether the defendants have satisfied that they are in adverse possession. The 1st defendant testified that she has been in possession since 1975. The 2nd defendant confirms the same. The witnesses also confirm the same. The plaintiff confirms that the defendants were not permitted to enter the land.

The Court of Appeal of Kenya in ***Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)*** approved the decision of the High Court in the case of ***Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B***, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”

The doctrine of adverse possession is not new to this court and Court of Appeal. It is a doctrine that has found clear exposition in many previous decisions of the Court of Appeal and perhaps the decision of Makhandia J (as he then was) in ***Muraguri Githitho v Mathenge Thiongo [2009] eKLR*** thus: -

“The law on adverse possession is in my view well settled. It is anchored on sections 7, 13 and 38 of the Limitation of Actions Act.

Section 7 provides interalia:-

“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 is first accrued to some person through whom he claims, to that person”.

Whereas Section 13 of the same Act is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

Finally, section 38 is as follows: -

“38. (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those acts, he 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 onus is on the person claiming adverse possession to prove, in the words of Kneller J (as he then was) in *Kimani Ruchine v/s Swift, Rutherford & Co. Ltd (1980) KLR 10* that: -

*“The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration;” see *Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.**

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; See Section 9 (1) and 13 of the Limitation of Action Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (See generally paragraphs 481 and 482 on pages 251, 252 of 24 Halbury’s Laws of England (3rd Edition).

More recently, Kariuki J restated the law on the subject in the case of *Omukaisi Abulitsa v/s Albert Abulista, Kakamega HCCC No. 86 of 2005 (UR)* in these terms: -

*“Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. **For these propositions of law, see *Gatimu Kinguru v/s Muya Ghangji (1976) KLR 253, Hosea v/s Njiru (1974) E.A. 526, Sospeter Wanyoike v/s Waithaka Kahiri (1979) KLR 236, Wanje v/s Saikwa (No. 2) (1984) KLR 284, Githu v/s Ndeete (1984) KLR 778, Nguyai v/s Ngunayu (1984) KLR 606, Kisee Maweu v/s Kiu Ranching (1982-88) 1KAR 746, – “see *Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002)*”. On this I would also add *Kasuve v/s Mwaani Investments Ltd & 4 others (2004) KLR 184, Samuel Miki Waweru v/s Jane Njeri Richu (2007) eKLR.*”****

Applying those principles to this case, it was proved that the defendants are in possession having entered the land without the plaintiff’s permission and without any secrecy, force and therefore I do find that the defendants have satisfied the court that they are in adverse possession of the parcel of land and do grant

orders that the plaintiff's suit be dismissed with costs. A declaration is hereby issued that the defendants are the legal owners of all that parcel of land Nandi/Kiminda/896 by dint of adverse possession and a Land Title to issue in favour of the defendants and a permanent injunction is hereby issued restraining the plaintiff, his agents, servants or employees from entering, trespassing or interfering with the land parcel No. Nandi/Kiminda/896. Cost and interest of the counterclaim. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY, 2017.

A. OMBWAYO

JUDGE