



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 447 OF 2013

JACOB KIPRONO KIPLAGAT:::PLAINTIFF

VERSUS

MARY KOBILO BARKWANG:::::::::::::::::::::::::::::::::::::1ST DEFENDANT

GIDEON BARKWANG:::::::::::::::::::::::::::::::::::::2ND DEFENDANT

JUDGMENT

By an originating Summons dated 31/7/2013 the applicant instituted this suit seeking for orders that:

- 1) The plaintiff has obtained title over Land Parcel No. UASIN GISHU/KUINET 'A' SETTLEMENT /88 by adverse possession.
- 2) The defendants' title over land parcel has been extinguished by lapse of time.
- 3) Pursuant to (a) and (b) above the Land Registrar in charge of the Uasin Gishu County Land registry where the register for land parcel No. **UASIN GISHU/KUINET 'A' SETTLEMENT SCHEME NO 88.** is situate do delete the name of the defendants and in lieu thereof enter the name of the plaintiff and issue the plaintiff with a title deed to land parcel No. **UASIN GISHU/KUINET 'A' SETTLEMENT SCHEME NO 88.**
- 4) Pursuant to (a), (b) and (c) above, the Land Registrar Uasin Gishu County Land registry or the land registry having lawful custody where the register for land parcel No.Uasin Gishu Kuinet/ 88 be ordered to issue a fresh title deed /certificate of lease to the plaintiff.
- 5) Costs be borne by the defendants.

The plaintiff also filed a supporting affidavit in support of his case while the respondents filed their replying and further affidavits respectively. The parties agreed by consent on 12th February 2013 that the status quo be maintained the same being that the plaintiff is in occupation of the suit land until the case is heard and determined. The court gave directions that the matter do proceed by way of viva voce evidence, the OS and supporting affidavit were deemed as a plaintiff and respondent's statement and the replying affidavit as the defense and defendant's statement respectively.

The suit came up for hearing on 4/4/17 when the plaintiff testified.

Plaintiff's Case

It was the plaintiff's case that he bought the suit land measuring 15 acres from the late James Barkwang Cheboiwo for Kshs. 40,000/ per acre from 31/12/1999 then later on 5/3/2000. The Plaintiff produced a copy of an extract of the green card and sale agreement marked as exhibit No 1 & 2 respectively in court. The Plaintiff testified that he later paid Kshs 50,000/- per acre for 10 acres making a total of 15 acres.

The plaintiff further testified that they did not write an agreement for the payment of the monies but the defendant would request for the money and he would give him. He produced 13 letters written by the defendant requesting for the monies as exhibit No. 3 'a to m'. and acknowledgement

It was further stated by the plaintiff that James Barkwang died in 2006 and the son who is the 2nd defendant took over from him. He produced a grant of letters of Administration as exhibit No. 4. The plaintiff also produced a copy of official search as exhibit No. 5. He stated that when he bought the land it was registered in the name of the Settlement Fund Trustees. It was the plaintiff's case that he is the one who paid the loan owed to the settlement Fund Trustees and produced a letter from the Settlement Fund Trustee and payment receipts. He also said that he took immediate possession of the whole parcel of land and built a semi-permanent house, planted trees in the year 2000. He further testified that he has fenced the whole parcel of land, built a latrine, dug a borehole and cemented it. He produced photos of the same as exhibit NO. 8.

The Plaintiff further testified that he is the one who has been paying land rates of which he produced payment receipts as evidence. He gave evidence that he had bought the land and not leased it as suggested by the defence. He produced a letter dated 11/7/06 written by James Barkwang requesting for money whereby he identified himself as seller.

It was the plaintiff's evidence that he was summoned to the Chief's office (Kongasis) on 4/4/13 where the respondents had reported a dispute in respect of the suit land. The plaintiff produced the proceedings from the Kongasis Chief's office where the suit land is situated. It was resolved in the proceedings that the plaintiff had bought the land from the late James Barkwang and had paid a total of Kshs 600,000/=. The proceedings were signed by all the parties involved including the 1st and 2nd defendant. The plaintiff therefore urged the court to declare that the suit land belongs to him.

On cross-examination by Mr. Kibii, the Plaintiff stated that he knew the deceased as a neighbor in 1982 but started leasing the land from 1997 and later entered into an agreement for sale with the deceased. He admitted that there was no one from the deceased family who witnessed the sale agreement. The plaintiff stated that the deceased died in 2006 and he sent his son to attend burial. The plaintiff also admitted that he was aware that the defendants had filed a succession cause in Nakuru but did not file an objection as he was not aware that he should file one.

On re-examination by his counsel he reiterated his evidence and stated that he is not related to the defendants and that he is currently in possession of the suit land.

PW2 Josephat Rono testified and stated that he has known the plaintiff as a neighbor since 1978 and that the deceased James Barkwang sold 2 acres to the plaintiff in 1999 and later in the year 2000 he sold an additional 3 acres to the plaintiff. He also stated that the deceased later sold to the plaintiff the whole parcel of land which he was to pay by installments. He also testified that he was a witness to the sale agreement.

PW2 testified that the plaintiff took possession of the suit land, fenced it and built a house. He also talked about the meeting at the chief's office and the deliberation that the land belongs to the plaintiff who is in occupation.

On cross-examination, he stated that he saw the 1st agreement which was for 3 acres for Kshs 40,000/= per acre. He also stated that the land was transferred to the deceased wife. He also confirmed that the plaintiff had leased the suit land before he bought it. The plaintiff therefore closed his case after calling one witness.

Defendant's case.

It was the defendant's case that the suit land belonged to the deceased James Barkwang. She stated that she filed a succession cause and the suit land was transferred to her to hold it in trust of her children and on her own behalf. She produced a copy of the title as DW exhibit No. 2.

The defendant stated that there was no objection filed in the succession cause and that her late husband did not tell her that he had sold the land as she did not sign the sale agreement. She urged the court to dismiss the Plaintiff's case with costs.

On cross-examination by the plaintiff's counsel, the defendant stated that she could not remember when the plaintiff occupied the suit land and how much he used to pay to lease the land. She further stated that she found an agreement after the death of her husband and did not know whether there were any other documents.

The defendant also stated on cross-examination that she had gone to complain to the chief but the chief resolved that the land had been sold to the Plaintiff.

DW2 Gideon Kipkoskei Barkwang stated that the suit land belonged to his late father James Barkwang. He confirmed that they filed a succession Cause which enabled them transfer the title of the suit land in his mother's name who is the 1st Plaintiff herein who was to hold it on her own behalf and in trust of her children.

The witness relied on the replying affidavit and a further affidavit filed in court as his evidence before the court. He further stated that he was not a witness to the sale agreement produced by the Plaintiff. He also said that they did not obtain a Land Control Board consent for transfer of the suit land.

On cross examination by the plaintiff's counsel, he admitted that he did not know when his father bought the land neither did he know when the plaintiff occupied the land. He also testified that he did not know what arrangement the plaintiff had with his father in respect of the suit land.

On re-examination by his counsel, DW2 stated that they did not agree with the verdict of the chief which resolved that the land belonged to the Plaintiff.

That marked the close of the defence case.

Both counsels filed submissions in support of their client's case.

Plaintiff's counsel's submissions.

Counsel for the Plaintiffs gave a background to the plaintiff's case and reiterated the evidence as stated. Counsel submitted that the Plaintiff entered the suit land in 1999 after purchase with the full consent and knowledge of the owner the late James Barkwang. It was further submitted that the Plaintiff would not have fenced and developed the suit land if he was a mere lessee and not a legal buyer. That is why he diligently paid land rates in respect of the suit land.

On the issue of the consent by a spouse, counsel submitted that this was not a requirement before the enactment of the Land Registration Act 2012. This Act was not meant to apply retrospectively as was established in the case of NAIROBI ENVIRONMENT AND LAND CASE NO. 240 OF 2012 – EN.W - VS- PWM and others where the court held that as regards the operation of Section 93(2) and (3) of the Land Registration Act 2012, would only observe that the Act came into operation in 2012.

Counsel further submitted that the transaction between the plaintiff and the deceased James Barkwang was executed in 2005 when spousal consent was not a requirement. It was counsel's submission that the Plaintiff had proved that he has been in actual, open, hostile, and continuous possession since 31.12.1999 and that time started running from 1999.

The Plaintiff relied on several authorities in respect of adverse possession namely Wambugu -vs- Njuguna 198 eKLR 173 Public Trustee and Kisumu Court of Appeal No. 134 of 1993, Eliud Nyongesa Lusena & Another -vs- Nathan Wekesa Omocha.

In conclusion counsel urged the court to enter judgment in favour of the Plaintiff as he had proved his case. He stated that the defendants had not offered any defence known in law to the plaintiff's claim. She relied on Order 2 Rule 4(1) of 2 of the Civil Procedure Rules.

Defendant's Counsel's Submissions.

Counsel for the defendant filed his submissions on 18.7.2017 and gave a background of the case.

Counsel listed 3 issues for determination by the court namely;

1. Whether the Plaintiff has fulfilled the ingredients for adverse possession.
2. Whether the plaintiff has an adverse claim against the defendants.
3. Whether the plaintiff is the owner of that parcel of land known as UASIN GISHU/KUINET "A" SETTLEMENT NO. 88 by adverse possession.

It was submitted by counsel for the defendant that from the evidence on record, the Plaintiff has not met the threshold for adverse possession. He stated that the plaintiff admitted that he entered the suit parcel of land vide permission by the defendant through a lease and later by purchase. He raised the issue of a lack of Land Control Board Consent for the sale of the land by the Plaintiff hence it was rendered null and void.

Counsel submitted that it is trite law that a claim for adverse possession must fail if it is demonstrated that possession was with the owner's permission or where the owner's title is acknowledged by the adverse possessor.

It was submitted that the plaintiff had not been in peaceful, uninterrupted and continuous occupation of the suit land freely and without fear for over 12 years. He also cited the same case cited by the plaintiff's counsel of Wambugu -vs- Njuguna on adverse possession. Counsel submitted that the 1st defendant is the registered owner of the suit land having been registered as such after a succession case in respect of the estate of her late husband James Barkwang.

The defendants prayed that the plaintiff's case be dismissed and their counter claim be allowed as prayed.

Analysis and determination.

The law on adverse possession is now settled and it is the most litigated issue in our courts. I think on the one hand this may be due to the provisions of the Land Control Act that requires consent for transactions involving agricultural land and on the other hand the Limitation of Actions Act. Time runs very fast and before you know it a person has been in occupation of your land for a period of 12 years and beyond. This is a case of adverse possession where the plaintiff seeks to be registered as an owner of land parcel known as UASIN GISHU/KUINET "A" SETTLEMENT NO. 88 measuring 9.5 hectares in place of the defendant who is the registered proprietor.

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. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land".

It is important to note that to constitute dispossession, the acts must have been done which 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”. Further 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 issues that the court is to determine are as follows;

1. Whether the plaintiff purchased the suit land known as UASIN GISHU/KUINET “A” SETTLEMENT NO. 88 from the late James Barkwang.
2. Has the plaintiff been in peaceful, uninterrupted and continuous occupation of the suit land for a period of more than 12 years.
3. Is the plaintiff entitled to be registered as an owner of the suit land?

Whether the plaintiff purchased the suit land known as UASIN GISHU/KUINET “A” SETTLEMENT NO. 88 from the late James Barkwang.

It was the plaintiff’s testimony that he bought the whole land parcel of land known as **UASIN GISHU/KUINET ‘A’ SETTLEMENT NO 88 measuring** 15 acres from 31/12/99. He stated that he first bought 2 acres and later on 5/3/00 he added another 3 acres at Kshs. 40,000/ per acre. He produced a certified extract of the green card as exhibit no. 1 as required by law and procedure and a sale agreement which was marked as exhibit no.2 The plaintiff also testified that he later agreed with the late James Barkwang to purchase the remaining 10 acres at Kshs. 50,000/ per acre which he paid in full by instalments. He produced various letters of acknowledgement by the late James Barkwang to establish that he had bought the suit land and paid in full. It was further the plaintiff’s evidence that he took immediate possession of the suit land, fenced, planted trees and did extensive developments. The plaintiff produced a bundle of photographs showing the development that he did on the suit land. He also produced receipts to show that he was the one paying land rates and Settlement Fund Trustee Loan.

From the evidence and the exhibits produced, it is evident that the plaintiff bought the suit land from the late James Barkwang. Why would the late Barkwang be receiving money and acknowledging receipt from the plaintiff in the presence of witnesses? The plaintiff is neither related to the deceased nor a charitable institution.

The defendants alleged that the plaintiff only bought two acres vide an agreement dated 31/12/99 but without the consent of the entire family. The defendants also brought another dimension to the evidence that the plaintiff was a lessee who leased the land from the late James Barkwang. During cross-examination on this angle of evidence the defendant stated that she did not know when the plaintiff took possession of the land and that she was not aware of how much the plaintiff was leasing the land for.

The question to ask is why would a lessee fence, plant trees, build permanent structures on land that he has leased? It does not make sense to develop or construct on land that you have temporary lease. The defendants further testified that they discovered an agreement that the late Barkwang had entered into for the sale of the land. The defendants also admitted that they had filed a complaint before the Chief of Kongasis Location who deliberated on the dispute and resolved that the late Barkwang had sold the land to the plaintiff. The proceedings dated 4/4/13 which were produced by the plaintiff as exhibit no. 13 were signed by both the plaintiff and the defendants. They did not object to the chief’s verdict in respect of the suit land.

I find that the plaintiff purchased the suit land from the late James Barkwang and took possession as stated in the evidence. I also find that the plaintiff followed the procedure under Order 37 Rule 7 of the Civil Procedure Rules, 2010 which 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.

Has the plaintiff been in peaceful, uninterrupted and continuous occupation of the suit land for a period of more than 12 years.

It was the plaintiff's evidence that he took possession of the suit land in 1999 upon purchase. The defendants also admitted that the plaintiff has been in possession of the suit land. There was uncontroverted evidence that the plaintiff has been in continuous, uninterrupted and exclusive possession of the whole land from 1999 and was still in possession in 2012 when he filed the suit and to date. Counsel submitted that the plaintiff has proved that he has been in actual, open, hostile, continuous possession of the suit land since 1999 and time started running then. The period from 1999 to the time when the plaintiff filed suit is more than 12 years.

The law is very clear that time ceases to run under the Limitation of Actions Act either when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor – **Githu v. Ndeete [1984] KLR 776**. There was no evidence from the defendants that they tried to assert their right by taking possession or taking legal proceedings. The present case was filed by the plaintiff to assert his rights to the property.

The plaintiff also proved that he has been in occupation of the land to the exclusion of the defendants. Counsel cited the Court of Appeal case of **Wambugu Vs. Njuguna 1983 KLR 173** where the court held that where the claimant is in exclusive possession of the land with leave and license of the Appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined. It should be noted that possession per se cannot be a basis of a cause of action. It is when it is adverse that it can form a basis of a claim in favor of the person in adverse possession.

I wish to further rely on the case of **Macharia Mwangi Maina & 87 Others – V – Davidson Mwangi Kagiri [2014] EKLR** where the Court of Appeal held that the appellants, who were purchasers of portions of the suit land and had been put in possession of the said portions by the respondent, were protected by Section 30 (g) of the Registered Land Act (now repealed). The act of the respondent had created an overriding interest in favour of the appellants in relation to those portions of land. It was also held that the respondent created an implied or constructive trust in favour of the appellants who had purchased the said portions from him. The court further cited the case of **Mwangi & Another - Vs – Mwangi [1986] KLR 328**, where the court held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

In this case the plaintiff has been in possession since 1999 and was still in possession when the deceased James Barkwang died in 2006. The defendants filed a succession cause and transferred the suit land to themselves without taking into consideration the plaintiff's proprietary interest. The plaintiff has been in possession with the knowledge of the defendants.

Is the plaintiff entitled to be registered as an owner of the suit land?

Counsel for the defendant submitted that the transaction was subject to a requirement for a consent from the Land Control Board. It is trite law that any transaction involving agricultural land must first seek and obtain a consent from the Land Control board. Counsel for the plaintiff submitted that failure to obtain the consent in this transaction made the sale void. He stated that the plaintiff's claim being grounded on the doctrine of adverse possession removed it from the purview of the Land Control Act Cap 302. In **Public Trustee – v- Wanduru, (1984) KLR 314 at 320 and 326** it is stated that the provisions of the Land Control Act have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. In the same case Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser

takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

Having found that the plaintiff had met the threshold for a claim of adverse possession, the issue of a consent of the Land Control Board does not arise in cases of adverse possession which is by operation of the law.

It is therefore evident that the plaintiff was in adverse possession from 1999 to the date of filling this suit in 2013. It is indicative that from 1999 when the plaintiff took possession to the time of filing suit in 2013 more than 14 years had lapsed which is more than the prescribed 12 years. The plaintiff also built a house, fenced the suit land, planted trees and dug a borehole within that period.

After evaluation of the evidence, submissions and the relevant authorities cited, I am of the considered view that the plaintiff has established on a balance of probabilities that he has acquired the suit title by way of adverse possession and make the following orders:

1. That a declaration is hereby made that the plaintiff has obtained title over Land Parcel No. UASIN GISHU/KUINET 'A' SETTLEMENT /88 by adverse possession.
2. The defendants' title over land parcel has been extinguished by lapse of time.
3. That the Land Registrar in charge of the Uasin Gishu County do delete the name of the defendants and in lieu thereof enter the name of the plaintiff and issue the plaintiff with a title deed to land parcel No. UASIN GISHU/KUINET 'A' SETTLEMENT SCHEME NO 88.
4. That the costs of this suit be borne by the defendants.

Dated and delivered at Eldoret on this 26th day of September, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Mitei holding brief for Magare for Plaintiff

Kiboi Terer & Co. for defendants – absent.

Koech – Court Assistant