



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 452 OF 2015

IN THE MATTER OF SECTION 38 OF THE LIMITATION

OF ACTIONS ACT(CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACT 2012

AND

IN THE MATTER OF REGISTRATION OF LANDS ACT 2012

AND

IN THE MATTER OF ORDER 37 RULE (1) (2) & 3 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE PLAINTIFFS HAVING ACQUIRED PRESCRIPTIVE

RIGHTS BYWAY OF ADVERSE POSSESSION ON A PARCEL OF

LAND BEING ELDORET MUNICIPALITY BLOCK 14/934

EMMANUEL MWANGA CHEMENGICH.....1ST PLAINTIFF

DORCAS CHEPTOO SIKOWO.....2ND PLAINTIFF

VERSUS

JULIUS KIPKETER.....DEFENDANT

JUDGMENT

By an Originating Summons dated 23rd December 2015, the plaintiffs herein sought for orders:

1. That the plaintiffs be registered as proprietors of **Eldoret Municipality Block 14/934** having acquired ownership or title through adverse possession and the title of the defendant be declared in so far as parcel No. **Eldoret Municipality Block 14/934** having been extinguished.

2. That the said land being parcel No. **Eldoret Municipality Block 14/934** be registered in the names of the plaintiffs.

3. Costs of the originating Summons be provided for.

The respondent was served with the Originating summons but never filed any response as required by law. The court later ordered that the matter be set down for hearing with service to the respondent which was done and an affidavit of service filed in court. This matter proceeded for hearing on 29th September 2017 as scheduled.

The 1st plaintiff Reverend Emmanuel Mwanga Chemengich testified on his own behalf and on behalf of the 2nd plaintiff Dorcas Cheptoo Sikowo who is his wife. He stated that the defendant herein sold to him the suit land known as Eldoret Municipality Block 14/934. He told the court that he carried out a search of the property on 12/2/12 which he produced as exhibit No. 1. He also produced an extract of the title of the suit property as exhibit No.2 which showed that a certificate of lease had been issued to the defendant Julius Kipketer in 1999.

The plaintiff further testified that he entered into a sale agreement with the defendant through his brother in -law Rev. John Rotich who negotiated the purchase price at Kshs. 620,000/ (six Hundred and twenty Thousand) Only which amount was paid in full. The plaintiff testified that during the time of the transaction he was out of the country but the brother in law did everything on his behalf. That upon his arrival Rev. John Rotich handed over the title and all the documents in respect of the transaction but unfortunately the documents got lost before the transfer was effected. He stated that he searched for the documents to no avail and even tried to get hold of the defendant but did not get him.

It was the plaintiff's evidence that after purchase of the suit land they took possession in April 2001 and started developing it by putting a permanent stone wall around it and connected utility services. He also stated that they constructed student hostels on the property which has been in use since 2003. The plaintiff further testified that they tried to get in touch with the defendant through the postal address on the sale agreement but did not get any response.

The plaintiff urged the court to order that the property be transferred to their names as they have been in occupation since 2001 which period is more than 12 years. He also prayed that judgement be entered in their favour as per the originating summons.

PW 2 Rev. John Kipkorir testified that the 1st plaintiff is his brother in law and the 2nd plaintiff is his sister. He stated that the plaintiff sent him money while he was in the USA to buy him a plot in Eldoret. He got him the suit plot known as Eldoret Municipality Block 14/934 and bought it for a consideration of Kshs. 620,000/. He stated that he paid Kshs. 500,000/ vide a banker's cheque and Kshs. 120,000/ cash to the defendant.

PW2 further testified that they wrote a sale agreement with the defendant at the offices of Tuyiot and Co. Advocates where the defendant handed over the lease certificate to him. He further stated that he handed over all the documents to the plaintiff upon his arrival in the country. The plaintiff later called him to tell him that he had misplaced the documents. He also stated that he has never seen the defendant again since they completed the transaction. It was PW2's evidence that he helped in the construction of the hostels on the suit land and that the plaintiffs have been in occupation since 2001.

Plaintiff's Counsel's Submissions

After PW2's evidence the plaintiff closed his case and counsel filed written submissions in support of the plaintiff's case. Counsel reiterated the plaintiff's evidence and submitted that the issue for determination is as to whether the plaintiff has been in open continuous and exclusive occupation, possession and use of land parcel No. Eldoret Municipality Block 14/934.

In response to this issue Counsel submitted that from the evidence on record the plaintiff stated that upon purchase they took immediate possession of the suit land and constructed student hostels from 2001 which is more than 16 years. He submitted that the possession by the plaintiff as demonstrated by the evidence was exclusive physical possession which was uninterrupted for a period of more than 12 years. That the same was all for open to see and neither was it forceful or in secret therefore exclusive in nature.

Counsel relied on the case of JAMES GICHERU MBUGUA VS LANTEI OLE KAPONYI (2015) e KLR where Kariuki J state that:

“.....the occupation based on an agreement which has become a nullity by operation of the law, transpose into adverse possession and the period prescribed by section 38 of the Limitation of Actions Act Cap 22 starts to run it is this court’s finding that the plaintiff has acquired the title to the three (3) acres of the suit land by way of adverse possession....”

Counsel further cited the case of MARION KAARI MBUI V ELISHA MBOGO NTHIGA (2016) e KLR where Olao J. relied on section 37 and 38(1) of the Limitation of Actions Act which deals with the issue of adverse possession.

Mr. Birech also cited the case of KASUVE VS INVESTMENT LTD & FOUR OTHERS 2004 KLR 184 which stated that in order to mount a claim of adverse possession of land registered in the names of another person, the claimant must prove that: -

“ He has been in exclusive possession of the land openly and as of right and without interruption for a period of Twelve (12) years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”

Counsel urged the court to find that the plaintiff had proved his case on a balance of probabilities and that judgement be entered for the plaintiff as prayed.

Analysis and determination

This is a case for adverse possession and the major issue that the court must determine is as to whether the plaintiff has met the threshold of being declared as having been acquired the suit land by adverse possession. The one important test or issue to be determined is whether the plaintiff has been in open, exclusive, continuous and uninterrupted occupation of the suit land.

The plaintiff’s uncontroverted evidence shows that he has been in occupation of the suit land since 2001 when he bought the same and started developments thereon. His occupation has been continuous and there has been no interruption by anybody or from any quarters. The plaintiff also met the procedures for filing his claim by way of originating summons and attaching an abstract of the Green Card in respect of the suit land which shows that it is registered in the name of one Julius Kipketer the defendant herein. The plaintiff has been in occupation for 16 years surpassing the 12 years threshold for a claim of adverse possession.

I have considered the plaintiff’s evidence, the documents relied on together with the submissions of the Counsel and I am convinced that the plaintiffs have proved that they are entitled to be registered as owners of the suit land by way of adverse possession as stipulated in the law. The defendant’s title is therefore extinguished and his registration as proprietor should therefore be cancelled.

I therefore enter judgement for the plaintiffs against the defendant in the following terms

1. That the plaintiffs be registered as proprietors of **Eldoret Municipality Block 14/934** having acquired ownership or title through adverse possession.
2. That the title of the defendant known as parcel No. **Eldoret Municipality Block 14/934** is declared extinguished.

3. That land parcel No. **Eldoret Municipality Block 14/934** be registered in the names of the plaintiffs **EMANUEL MWANGA CHEMENGICH AND DORCAS CHEPTOO SIKOWO**.

4. Costs of the originating Summons to the plaintiffs.

Dated and delivered at Eldoret on this 16th day of October, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Miss Tum for the Plaintiff/Applicant

Mr. Koech: Court Assistantk