



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL SUIT NO.128 OF 2004 (O.S)

JOEL KIPNGETICH CHEPKWONY.....APPLICANT

VERSUS

CHRISTOPHER TAITA A. CHERUIYOT.....1ST RESPONDENT

KIPLANGAT A. CHERUIYOT (*Sued in their capacity as the administrators of the estate of*
CHERUIYOT ARAP ROGITO (Deceased).....2ND RESPONDENT

JUDGMENT

(Suit by way of adverse possession on behalf of estate of a deceased person; suit property purchased by deceased in the year 1976; no evidence of any interruption; 12 years had lapsed to the year 2004 when suit filed; claim succeeds)

This is a fairly old case commenced on 16th December 2004 by way of an Originating Summons taken out pursuant to the provisions of **Order XXXVI Rules 3, 3D and 12** of the **Civil Procedure Rules** that preceded the Rules of 2010. The applicant (whom I will refer to as the plaintiff) is administrator of the estate of Kipkering arap Mosonik (deceased) and he has sought orders that the estate of the said Kipkering arap Mosonik is entitled to be declared owner of 1.6 hectares of the land parcel Kericho/Kapsoit/583 (the suit property) by way of adverse possession. The Originating Summons (O.S) is supported by the affidavit of the applicant.

He has deposed *inter alia* that by an agreement made in the year 1976 between his father (arap Mosonik) and the respondents' deceased father (Cheruiyot arap Rogito of whom the respondents are administrators), arap Mosonik purchased 1.62 hectares of the suit property at a consideration of Kshs. 2,200/=. It is averred that arap Mosonik then took possession, cultivated the land and planted trees especially on the boundaries. It is also deposed that he planted about 70 bushes of coffee around the year 1993. He also put up a grass thatched house in the year 1985 which the applicant lived in after undergoing initiation. The applicant subsequently erected three other houses on the land in the year 1998 when he got married. It is averred that despite the sale, the parties did not seek the consent of the Land Control Board although documents for subdivision and transfer forms were executed. It is deposed that the seller died around 1981 but the applicant's father, continued being in possession. The applicant averred that he is therefore entitled in his capacity as personal representative of the estate of the deceased and/or in his own capacity, to ownership of the claimed parcel of land by adverse possession.

The respondents replied to the O.S by filing a Replying Affidavit sworn by the 1st respondent. He deposed *inter alia* that he had earlier filed a case against the plaintiff's father (arap Mosonik) prior to his death, being Kericho Resident Magistrate's Civil Suit No. 322 of 1990. It is deposed that in his defence,

arap Mosonik denied having purchased any land from the plaintiff in the said suit. It is averred that arap Mosonik ceased to interfere with the land until his demise in the year 2002 which was before the determination of the suit. He has deposed that the applicant's case is based on agreement but which became null and void for lack of consent of the Land Control Board. It was also deposed that in the succession cause of the estate of Arap Mosonik, the applicant did not list the suit property as part of the estate of Arap Mosonik. It was denied that the applicant has ever been put in possession of the suit property and it was also denied that Arap Mosonik carried out any developments on the land. It was deposed that the plaintiff has no construction, and has never planted any trees or put up any structures on the suit land. It was further deposed that by relying on the contract of sale, the applicant is precluded from asserting title by adverse possession.

On 6 October 2005, directions were taken that the suit do proceed by way of *viva voce* evidence, and the O.S be treated as plaint. The same directions were also given on 23 February 2011. The replying affidavit was directed to be treated as the defence and it was further directed that the suit do proceed as a normal civil suit. The respondents (whom I shall refer to as the defendants) were initially represented by the law firm of M/s Nyaingiri & Company Advocates but they later proceeded to act in person. In the course of time, the 2nd defendant died leaving only the 1st defendant in the suit. The character of the suit did not however change as the two defendants had been sued in their capacity as joint administrators of the estate of the late Cheruiyot arap Rogito.

After several missteps, the hearing of the matter eventually commenced before me on 28th September, 2015. The plaintiff, testified that he was born in the year 1972 and that he is the administrator of the estate of arap Mosonik. He produced a grant of letters of administration ad litem authorizing him to file suit on behalf of the estate of arap Mosonik issued on 26th October 2004. The plaintiff also produced a grant of letters of administration for the estate of Cheruiyot arap Rogito issued to the two defendants on 26th July 2004. He testified that his father (arap Mosonik) purchased 1.6 hectares of the property from arap Rogito in the year 1976 through a written agreement. The whole land is 11.6 hectares. He testified that the purchase price was Kshs. 2,200/= which was paid in full and that arap Mosonik took possession in the year 1976. He stated that steps were taken to register the land in the name of arap Mosonik, as an application for consent to subdivide and to transfer, was made to the Land Control Board. A transfer of land instrument was also executed. However the property was never transferred to arap Mosonik but he continued occupying it. The plaintiff testified that his father developed it by constructing grass-thatched and timber houses for his family. He also planted 2000 tea bushes. The plaintiff himself added another 1000 tea bushes. He produced a tea plantation licence and verification certificate dated 10 February 1998. The plaintiff stated that he has lived on the property all his life and that they have never had a dispute with anyone. He testified that a case had been filed by the defendant, being Kericho PMCC No. 322 of 1990, to claim the land from arap Mosonik but stated that by that time, they had lived on the land for over 14 years. He does not know what happened to the case. He stated that arap Mosonik died in the year 2000.

In cross-examination, the plaintiff stated inter alia that he does not know why the property was never transferred to his late father. He denied having moved a house within the land under instructions of the defendant. He stated that the 1st defendant has three brothers who live in a different portion of the larger land parcel that was not sold to the plaintiff's father.

PW-2 was Joshua Kipsang Sambu. He is a neighbor to the plaintiff. He testified that the plaintiff's father bought the suit property from the defendants' father and that he took possession thereafter. He stated that at the time of sale, he is the one who measured the land. He testified that the plaintiff's father planted trees on the property and along the boundaries. In cross-examination, he stated inter alia that arap Rogito sold part of his land to purchase another property in Londiani area where the 1st defendant now resides.

With the above evidence, the plaintiff closed his case.

The defendant gave evidence in Chief but he failed to attend for cross-examination. Since the evidence was untested, in the interests of justice, I ordered that the same be expunged, and I will therefore make no reference to it. In the circumstances, I will presume that the defendant did not tender any evidence.

No submissions were tendered by either party and I take the following view of the matter.

The case herein is one for adverse possession. It is the plaintiff's contention that his father acquired title by way of adverse possession and therefore his estate must benefit from the land claimed, which is 1.6 hectares of the land parcel Kericho/Kapsoit/583. From the evidence on record, it is apparent to me that arap Mosonik purchased 1.6 hectares from arap Rogito in the year 1976. There are documents for consent to subdivide and to transfer, directed at the Land Control Board, which are dated 18 November 1976. There is also a transfer of land instrument dated 18 November 1976. I have no reason to doubt these documents, which to me, evidence that arap Rogito had agreed to sell to arap Mosonik, 1.6 hectares of the suit property. This is the manner in which arap Mosonik came into possession of the property. I have also seen the tea plantation licence and Verification Certificate issued in January and February 1998, by the Kenya Tea Development Authority in favour of the plaintiff. These to me evidence that the plaintiff and/or the family of arap Mosonik had planted tea on the suit property and were enjoying the proceeds thereof. The evidence of PW-2 also buttresses that of the plaintiff with regard to the possession of arap Mosonik and his family on the suit property.

There was mention of the suit Kericho PMCC No. 322 of 1990, but as I stated earlier, I have expunged the evidence of the defendant, for failure to have it tested in cross-examination. I am therefore unable to make reference to this suit.

My own view of the matter is that arap Mosonik and his family resided on 1.6 hectares of the suit property starting from the year 1976, after arap Mosonik purchased the same. arap Mosonik could not claim the land through purchase, since the consent of the Land Control Board had not been sought. However, this does not preclude him from claiming the land by way of adverse possession since the full purchase price had been paid.

To succeed in a claim for adverse possession, it is trite law that one needs to demonstrate quiet, open and peaceful possession of land for a period in excess of 12 years, coupled with the requisite *animus possidendi*, or intention to have the land as one's own.

At the time of filing suit, 12 years had certainly lapsed since the year 1976 which is the time that arap Mosonik took possession of the property. I have no evidence that the possession of the suit property by arap Mosonik and his family has ever been interrupted. Neither do I have any evidence that the said possession was not peaceful and was not open. My overall assessment of the evidence is that the requirements needed to succeed in a case of adverse possession have been met by the plaintiff. I therefore allow this suit and now make the following final orders :-

- 1. I declare that Kipkering arap Mosonik acquired title by way of adverse possession to 1.6 hectares of the land parcel Kericho/Kapsoit/583.*
- 2. I declare that this portion of 1.6 hectares do vest in the estate of the late Kipkering arap Mosonik and be availed for distribution to the beneficiaries of his estate.*
- 3. I direct the Deputy Registrar, Kericho, to execute all requisite documents required to carve out this portion of 1.6 hectares from the land parcel Kericho/Kapsoit/583, and to transfer it to the estate of Kipkering arap Mosonik.*
- 4. The applicant shall have the costs of this suit.*

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 29TH DAY OF JANUARY, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In presence of:

1. Mr. Caleb Koech for Applicant
1. 1st Respondent- present acting in person
2. Court assistant- Kenei