



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 342 OF 2013

PETERO KIPNGETICH ARUSEI.....PLAINTIFF

VERSUS

VINCENT KIPKURUI TUWEI.....DEFENDANT

JUDGMENT

Petero Kipng'etich Arusei (*hereinafter referred to as the plaintiff*) has brought this action against Vincent Kipkurui Tuwei, (*hereinafter referred to as the defendant*) claiming that on or about the 27th day of February, 1997 the plaintiff being the lawful owner of that parcel of land known as Uasin Gishu/Sosiani Settlement Scheme/20 (then unregistered) entered into an agreement for sale of a portion of the suit land measuring 5 acres at an agreed consideration of Kshs.325,000. That it was a term of the said agreement that Kshs.280,000/= would be paid upon signing the said agreement while the balance of Kshs.45,000/= would be paid once the title deed was issued to the plaintiff as the registered owner of the suit land herein. Shortly after the agreement of sale of 27th day of February 1997, the defendant gave the plaintiff a further Kshs.350,000/= for purchase of an additional 5 acres of the suit land and that he was issued with title deed for the suit land in June, 2004 and upon presenting it to the defendant for inspection at his request, the defendant failed to return the original title deed for the suit land herein, claiming that the same had been misplaced. Pursuant to the foregoing, the plaintiff applied for and was issued with duplicate title deed for the suit land herein in the year 2006. The plaintiff avers that when the defendant learned that he had been issued with a duplicate titled deed, the defendant registered caution barring any dealing in the suit land and all efforts to have the same revoked have been fruitless. The defendant also failed to clear the outstanding balance of Kshs.45,000/= as per the agreement of 27th day of February, 1997 or at all. The plaintiff states that on the 9th day of November, 2011, he instructed his advocates on record to notify the defendant that the agreement in issue stood rescinded on the grounds that:

- i. The defendant had failed to clear the balance of the consideration within the agreed time on at all.*
- ii. The defendant had registered caution restraining any dealing in the suit land without any reasonable case.*
- iii. The consent to transfer was not obtained from Land Control Board within the statutory period or at all.*

The plaintiff avers that he has been ready to refund the Kshs.630,000/= received from the defendant in part settlement of the consideration but the defendant has declined to accept the same and the plaintiff therefore prays for a declaratory order holding that the defendant breached the agreement dated 29th

February, 1997 by failing to clear the outstanding balance in the sum of Kshs.45,000/=. The plaintiff further prays for a declaratory order holding that the continued registration of caution by the defendant, barring any dealing in the plaintiff's land parcel No. Uasin Gishu/Sosiani Settlement Scheme/20 is unlawful. The plaintiff also prays for a declaratory order holding that the agreement dated 29th February, 1997 is no longer enforceable because consent to transfer was not obtained within the requisite time pursuant to the provisions Section 6(1) (c) and Section 8(1) of the Land Control Act. The plaintiff ultimately prays for an order of injunction restraining the defendant from interfering with the plaintiff's peaceful enjoyment of land parcel No. Uasin Gishu/Sosiani Settlement Scheme/20.

The Defendant filed defence and counterclaim stating that he purchased 5 acres of land from the plaintiff on 29.2.1997 and a further 5 acres on 2.8.1998 which were to be hived from the plaintiff's parcel of land known as L.R. Uasin Gishu/Sosiani Settlement Scheme/20 which was then registered but encumbered by the Settlement Fund Trustee. The second agreement superseded the first in all particulars. That both agreements of 1997 and 1998 between the plaintiff and the defendant were entered into in the full knowledge and understanding that the property was still charged to the Settlement Fund Trustee. The defendant avers that he is the one who paid the redemption sum to the Settlement Fund Trustee, procured the Discharge of Charge and presented the same for registration to the Uasin Gishu District Land Registrar and was present when the plaintiff collected title and handed it over to him for safe keeping. The defendant avers that he saw the Kenya Gazette No. 3774 of 26.5.2006 and did make a timeous objection and representation to the office of the District Land Registrar, but that that office did proceed to issue a duplicate title in unclear and suspect circumstances. An extract of the register will confirm that the defendant has a lien over the title. The defendant avers that he is ready able and willing to surrender the title and withdraw the restriction on the same so long as the plaintiff can convey to him the 10 acres that he purchased in 1998 and has been in uninterrupted occupation ever since. According to the defendant he entered the second agreement in 1998 and paid the entire purchase price and took possession of the suit land, which is acknowledged by the plaintiff and the witnesses present and that no money is owed to the plaintiff and that he is in occupation and continues to be in such occupation. The parcel of land was at the time of sale excluded from the requirements of the Land Control Act.

That the defendant avers that he had fully paid for his acquisition and taken possession and therefore there could not have been breach of any conditions of sale nor a refund. The defendant shall crave for leave to enlarge time within which to complete the sale so as to comply with the Land Control Act and conform with the doctrine of specific performance. The defendant further avers that neither a declaration annulling the transaction of 1997, or that of 1998, nor an injunction can issue in favour of the plaintiff who has sold and divested himself of possession of a portion of land for a period in excess of 15 years. Accordingly, the defendant claims a purchaser's interest in the suit land which has been crystallized by effluxion of time to qualify as adverse possession. The defendant claims that there is an unresolved dispute pending before the District Land Registrar, Uasin Gishu over the issuance of the replacement title and the defendant prays that the plaintiff's suit be dismissed with costs.

The defendant filed Counterclaim reiterating the contents of the defence and counterclaims that he purchased 10 acres of the suit land from the plaintiff between 1997 and 1998 and has been in uninterrupted occupation ever since and that the plaintiff having divested himself of 10 acres of L.R. No. Uasin Gishu/Sosiani Settlement Scheme/20 as far back as 1998 and only having obtained title in 2004, did so in trust for the defendant to the extent of the 10 acres held by the defendant. That in the alternative and without prejudice to the foregoing, the defendant prays against the plaintiff for orders of specific performance so as to complete to perfection the transfer of 10 acres purchased by the defendant in 1998.

In his reply to defence to counterclaim, the plaintiff states that the doctrine of adverse possession does not apply and that the defendant's possession of the 10 acres comprised in the suit land has been interrupted on several occasions. Moreover, that the defendant did not satisfy the consideration and that the provision of the Land Control Act were not complied with.

When the matter came for hearing, the plaintiff adopted his written statement and testified that he is the registered proprietor of the land in dispute and has the title deed for the same. He sold the defendant the land in issue. According to the agreement, he sold the defendant 5 acres on the purchase price and the

balance was Kshs.45,000/=. The defendant failed to pay the balance of Kshs.45,000/=. The defendant went back and the plaintiff sold him another 5 acres whereupon he paid full purchase price. He sold the defendant a total of 10 acres. He obtained the title in 2004 which was collected by the defendant from the Lands Office but the defendant retained it. The defendant refused to hand over the title deed to the plaintiff and put a caution on the parcel of land. The plaintiff did a demand notice and there was a reply from the firm of Momanyi Anassi. He is willing to pay back a sum of Kshs.675,000/=. The defendant farms on the land but does not stay on the same. They have never gone to the Land Control Board. He prays that the defendant be evicted.

On cross examination by Mathai, he confirms that he sold the defendant's land in the agreement. The first agreement was for 5 acres whereby the defendant paid the consideration less Kshs.45,000/= whilst the second agreement the consideration was paid in full. The total acreage purchased was five acres. He states that the defendant took the title from the Lands Office (contradicting his averment in the paragraph 8 of the plaint). He reported to the police on a date he cannot remember and does not have the O.B. report.

The defendant testified that the plaintiff is his neighbour and his paternal uncle. He has transacted with the plaintiff twice, first, on 29.2.1997 when he sold him five acres of land and paid Kshs.65,000/= per acre totalling to Kshs.325,000/=. He did another transaction on 2.8.1998 for five more acres and the agreement was reduced in writing and he paid another Kshs.325,000/=. He produced the agreement. On 3.8.1998, he was called by the plaintiff in the presence of the chief and his neighbours and was allowed to fence 10 acres and has occupied the same to-date uninterrupted. He has not been issued with the title to the land as it was still under Settlement Fund Trustee. He assisted the plaintiff to obtain a discharge of charge in May 2004 whereupon the defendant took the original title deed. He produced the original title deed. He kept the original title deed to safeguard his interest as they were to move to the Land Control Board. He paid Kshs.250 for the consent. When he requested the plaintiff for subdivision, the latter refused. He realized later that someone else was seeking to acquire the land on the 26.5.2006. He noticed a Gazette notice No. 3377 of 26.5.2006. He did a search at the Lands Office and found that a replacement title had been made. He does not owe petitioner any money and that his claim is for the 10 acres. The defendant has fenced the land and planted trees. On cross examination by Kipnyekwei, he states that Kshs.45,000/= was used to clear the Settlement Fund Trustee loan. However, he does not have the receipt as he gave it to plaintiff to clear the loan.

The plaintiff submits that he is the registered owner of the suit land hence with all rights and privileges appurtenant thereto and that the parcel of land was not available for alienation as it belonged to Settlement Fund Trustee. There is no evidence that the balance of Kshs.45,000/= was paid. Lastly, the plaintiff argues that the consent of the Land Control board was not obtained. On adverse possession, he argues that adverse possession does not apply as the plaintiff obtained the title deed in the year 2004 and the suit was filed in 2014 before the lapse of 12 years from issuance of title.

The defendant on his part submits that the doctrine of estoppel espoused by section 120 of the Evidence Act precludes the plaintiff from denying the existence of the sale agreement in those circumstances. He offered land for sale, contracted to sell and received consideration and put the defendant in possession of the land only to turn back and purport to rescind the same some 16 years after the event.

I have considered the evidence on record, submissions by counsel and do find that the land in dispute measures 19.5 hectares from which the plaintiff claims 10 acres. The registration of the parcel of land was opened on 19.5.1979 in the Uasin Gishu, Sosian Settlement Scheme Registration Section. The 1st entry was registered in the name of Settlement Fund Trustee. The second entry was entered on the 9.6.2004 in the name of Petero Kipngetch Arusei of Identity No. 683816 of P. O. Box 980, Eldoret. A title deed was issued on the same date. On the 26.7.2004, an entry was made in respect of title deed replacement issue Gazette Notice No. 3774 of 26.5.2006 and that on 5.9.2006, the registrar entered no dealings until the case of replacement of the title deed was resolved. On the 30.10.2006, the Register entered a caution by the defendant claiming purchaser's interest. On the 3.11.2011, the caution was withdrawn by the District Land Registrar. The encumbrance section of the title shows that the property was charged to the Settlement Fund Trustee on the 19.5.1979, however, a discharge of charge was entered on 9.6.2004.

It is evident from the agreements produced in court that on the 29.2.1997, the plaintiff and the defendant entered into an agreement for sale of 5 acres of the suit property at Kenya Shillings Sixty Five Thousand per acre totalling three hundred and twenty five thousand shillings. The defendant paid Kshs.280,000/=, the balance of forty thousand shillings was to be paid upon the successful registration of the parcel of land in Nairobi. The second agreement was entered into on the 2.8.1998 between the two parties in respect of 5 more acres at Kshs.65,000/= amounting to Kshs.325,000/=. The amount was paid in full.

Both agreements were duly executed by the parties herein and their witnesses. The defendant was given possession of the 10 acres of the suit property on 3.8.1998 and has been in occupation to-date. At that time the parcel of land was still under Settlement Fund Trustee, hence no title was issued. I believe the defendant when he states that after discharge of charge and title issued in 2004, he took the original title as security for the purchase price he had paid otherwise, how could he have been given possession of the title deed by the plaintiff as he did not steal the same. The plaintiff can not be believed because he never reported to the police the loss of the original title deed. Moreover I believe that the defendant is stating the truth when he says that the balance of Kshs.45,000/= was used to pay the balance of loan as the plaintiff has not produced a single demand letter for payment of balance. I do find that the plaintiff was not truthful in his explanation as how he obtained the replacement title and yet he knew very well that the defendant had in his possession the original title due to the fact that he was entitled to 10 acres of the suit property.

The defendant relies on the principle of adverse possession which 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, which 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.”

vi. In consequence of any law with respect to the limitation of actions.”

This court further finds that adverse possession applies on private land as opposed to public land. Article 64(c) of the Constitution of Kenya defines private land as registered land or land held by any person under freehold or leasehold or any other land declared private land under an Act of Parliament. The doctrine of adverse possession in effect allows a party to acquire land in accordance with the law. **Section 7 (i)** of the Land Act recognizes that title to land may be acquired through any manner prescribed by statute.

Section 28 of the Land Registration Act, too recognizes right to land acquired by virtue of any written law relating to the limitation of actions or other rights acquired by any written law. By operation of these statutes, an adverse possessor gains title both in land held under freehold and leasehold and is entitled to equal protection of the law over this property. I do find that the plaintiff was registered proprietor in the year 2004 and therefore time begins running on the date of registration and not the date of possession by the defendant. The principle of adverse possession does not apply as 12 years had not lapsed when the suit was filed.

Conversely, this court finds that the defendant has been in possession of 10 acres of the suit land for more than 14 years after he entered into an agreement with the plaintiff in 1997 and 1998. The plaintiff divested himself of the 10 acres and put the defendant in possession creating an implied trust in favour of the defendant. There was no need of the consent of the Land Control Board for an implied trust.

Ultimately, the court finds that the title held by the plaintiff over L.R. Uasin Gishu/Sosiani Settlement Scheme/20 is so held in trust for the defendant to the extent of 10 acres held by the defendant. It is hereby ordered that the 10 acres occupied by the defendant be excised and be registered in the name of the defendant. The plaintiff's suit is dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE