



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 922”A” OF 2012

MAINA WAHOME.....PLAINTIFF

VERSUS

ESTHER CHEROP MUREY..... 1ST DEFENDANT

MUSA SONGOK..... 2ND DEFENDANT

JACOB MUTAI.....3RD DEFENDANT

EZEKIEL LAGAT..... 4TH DEFENDANT

MURAGE MUTHAMI.....5TH DEFENDANT

CECILIA WANDIA.....6TH DEFENDANT

RUTH JERUTO KUTUNY.....7TH DEFENDANT

JUDGMENT

Maina Wahome, (hereinafter referred to as the plaintiff) has sued **Esther Cherop Murey, Musa Songok, Jacob Mutai, Ezekiel Lagat, Murage Muthami, Cecilia Wandia** and **Ruth Jeruto Kutuny** (hereinafter referred to as the defendants) claiming that he is the registered proprietor of all that land known as L.R. Uasin Gishu/Kondoo/560 measuring 2.6 ha. That prior to the registration of the plaintiff as proprietor by transmission on 28.3.2012, the same existed as an undivided share in the name of Annah Wanjiru Nduati and the Settlement Fund Trustee. In unknown dates in the year 2012, the defendants invaded the plaintiffs piece of land known as L.R. Uasin Gishu/Kondoo/560 and parceled it into 7 plots ranging from ½ acre to 2 acres claiming to have purchased it from a third party. The defendants' action of invading the plaintiffs parcel of land and subdividing it haphazardly amongst themselves and remaining thereon constitutes trespass and false detainer of land. The plaintiff has sought the help of the administration arm of government to no avail. The defendants' action has denied the plaintiff access, utility and use of his land for which the plaintiff claims mesne profits at the rate of Kshs.5,000/= per acre per year since 2012 to-date. That the plaintiff avers that the defendants' action of trespass and false detainer is unlawful, illegal and unjustified as it also violates the plaintiff's constitutional right to hold and enjoy property as an individual. The plaintiff prays against the defendants individually and collectively that they be evicted from the suit land and he be put into possession of L.R. No. Uasin Gishu/Kondoo/560 and for an order of permanent injunction against each and all of the defendants from ever setting foot, using, cultivating or in any way dealing with parcel No. L. R. Uasin Gishu/Kondoo/560 and further mesne profits from 2012 at the rate of Kshs.5,000 per acre upto determination of the suit. Last but not least the plaintiff prays for Costs of the suit and Interest till payment in full.

The defendants filed defence and counterclaim dated 12.1.2013 averring that the plaintiff's title was subject to challenge by way of revocation and a nullity proceedings in Eldoret High Court Succession Case No. 188 of 2010 In the matter of the Estate of the late Annah Wanjiku Nduati – deceased as the same was not obtained through the proper procedure and that the action of recovery of land was time barred by virtue of section 7 of the Limitation of Actions Act Cap 22, Laws of Kenya as the occupation of the defendants commenced early in the year 1992. According to the defendants, the title of the late Annah Wanjiku Nduati had been extinguished by the adverse possession of the defendants. The defendants aver that the plaintiff has admitted the sale of the land to some of the defendants which is an admission of the lawful occupation hence by the tenet of estoppel no relief can be issued against the defendants which is inconsistent with the admission.

The defendants further aver that the court is bereft of jurisdiction to litigate on the suit and the issues therein are *res-judicata* as the plaintiff in the year 2010 lodged a claim for trespass to agricultural land with the Land Disputes Tribunal in case No. 6 of 2010 but the same was dismissed and he was ordered to sub-divide the land and convey to the defendants their respective portions.

The defendants further aver that on 1st September, 2010, the award of the Tribunal was lodged in the Chief Magistrate's Court at Eldoret and to-date, the plaintiff has not challenged the findings by way of appeal or judicial review.

In Counterclaim, the defendants aver that the plaintiff's title has been obtained fraudulently and in an inconsistent manner with the findings of the Land Disputes Tribunal as the proceedings to obtain a grant of the estate of the late Annah Wanjiku Nduati without due disclosure of the interests of the defendants in the estate and proceedings to institute the suit after having lost in the Land Disputes Tribunal are particulars of fraud. The defendants further aver that they have been in occupation of the land parcel known as Uasin Gishu/Kondoo/560 for over 12 years, in open without secrecy or consent of the plaintiff thus the defendants seek a declaration that the title of the late Annah Wanjiku Nduati had been extinguished at the time the plaintiff acquired the same by transmission thus the plaintiff's title be cancelled and registration of the defendants as proprietors be effected. The defendants pray that the suit be dismissed with costs and judgment be entered on the counterclaim.

In reply to defence and defence to counterclaim, the plaintiff denies the defendants' claim based on adverse possession and further denies that the suit land was obtained fraudulently. He states that the defendants' entry to the suit land was illegal, unlawful and without any colour of right.

When the matter came for hearing, the plaintiff, Maina Wahome stated that he lives at Loliondo, Tanzania and he knows Esther Cherop Murey and her friends, the defendants. They entered his land and claimed to have bought it. The land is in Kondoo farm. He was registered on 28.3.2012. Before registration, the land belonged to his mother who did not have title before she died. He did succession and obtained title. The defendants entered the land measuring 6.5 acres in 2006 without his notice and permission to remain in the land. He sold only one acre of the land to Ruth Jeruto Kutuny. Esther Cherop Murey is occupying one acre. Musa is occupying half an acre. Jacob Mutai bought and is occupying ½ an acre whilst Cecilia Wandia is occupying one acre. Ruth is occupying one acre. None of the defendants bought the land from his mother. The land was a settlement scheme hence they had not claimed payment to the Settlement Fund Trustees and therefore, she could not get the title deed. He paid the balance before he was given the title. His elder sister, Maria Muthoni Mwangi, who was married in Nyeri but not the administratrix of the Estate of deceased sold part of the land. She was involved in succession but did not object to the plaintiff becoming the administrator.

He informed the defendants that the land was his but they did not listen. On the 12.1.2006, he wrote to the defendants to leave the land. The others were given notice to vacate. He has a letter from the District Officer, Kesses Division and produced it as PEx1. He sold land to Ruth Jeruto Kutuny and produced the Agreement as PEx2. He produced the letter of the Chief as PEx3. Maria Nyatoro is his deceased sister. She sold part of the land measuring approximately 3½ acres. She did not have title, she did not have a grant. She never took them to the Land Control Board. When he visited the land in 2005 there were no people but they came in 2006. He could have been receiving rent in a year of Kshs.6000/=

per year His mother who died on 2.5.2000 has never been sued. He prays that the defendants be evicted. He prays for costs and interest plus mesne profits. He prays for Kshs.5000/= for acre for 3 years.

On cross examination, he states that his sister is Maria Muthoni Mwangi. He sued her in 2012. In the Tribunal, he wanted it to be decided that she sold the land without his permission and wanted the defendants to be evicted. They decided that they share the land equally. The land belonged to their mother and therefore his sister had no right to inherit. He filed a succession cause No. 188 of 2010. His sister was not included because she was married. He was given a grant. The grant was confirmed. He went to Lands and got registered. He was issued with a title. He does not know that the grant was revoked. He was shown the order revoking the grant dated 24.6.2013 but stated that he was not aware.

On re-examination, he states that he was not served with the application to revoke grant. He does not know whether the decision of the Elders was adopted. His sister should leave his land as he has not sued her. He has now seen the order revoking confirmation. The Land Registrar has never written to him.

The defence called 3 witnesses. **DW1, Esther Cherop Murey** testified that she lives at Leingusen in Burnt Forest and knows Maina Wahome. She has been sued. They were sued seven of them. She wrote a statement. The land in dispute was sold to her by the plaintiff's sister known as Nyatoro in 2006. There are many who found her on the land. She does not know where the plaintiff got the land. Maina Wahome sued her when she was in the land that belonged to the plaintiff's mother known as Anna Wanjiku. She does not know anything about the mother's health and does not have somewhere to go. She prays that the land be subdivided to them. She produced the green card showing the land belonged to Maina Wahome's mother.

DW2, Ruth Jeruto Kutuny testified that she lives at Olunguren in Burnt Forest and also knows Maina Wahome who has sued them because of land. He sold her land. She has an agreement from Maina Wahome and she produced it as DEx2. She paid Kshs.100,000/= for the land which was in his mother's name thus Anna Wanjiku Nduati. The land is now in the plaintiffs name. The land was still in the name of his mother when she died. She later heard that Maina had a title deed. She does not know how Maina got title. She prays for the orders in the counterclaim. She prays that the court cancels the title deed.

DW3, Emmanuel Lobolia, Executive Officer in-charge of Family Division, Eldoret High Court testified that he has the file in respect of PA 188 of 2010. The deceased is Annah Wanjiku Nduati. Maina Wahome brought a petition on 8.9.2010 to succeed the deceased. The beneficiaries are, **Maina Wahome – son, Maria Nyatoro – daughter**

and Nyaruai Chumba – daughter. The assets, were Plot No. 560 at Kondoo Settlement Scheme in Uasin Gishu. The second is Marimanet/North Rumuruti Block 2/Ndurumo/2345 Plot No. 181/Nanyuki. On 21.9.2010, a grant of letters of administration intestate were issued to Maina Wahome. It was confirmed on 4.10.2010. During confirmation, the assets were all recorded in the name of Maina Wahome. Subsequently, there was summons for revocation grant filed by Maria Nyatoro, Maina through Kigama advocate. A decision was made on 24.6.2013 thus, the grant was revoked.

The plaintiff through **Mr Ngigi Mbugua** learned Counsel submits that prior to the registration of the plaintiff as proprietor by way of transmission on 28.3.2013, the suit land existed as an undivided share in the name of Annah Wanjiku Nduati. A Search at the Lands Registry in Eldoret confirms that the plaintiff is the registered absolute proprietor. There are no records of subdivision. He argues that the plaintiff should be granted orders of permanent injunction as he is the absolute proprietor of the land. There is no evidence of fraud. On adverse possession, the plaintiff submits that the defendants' claims are unfounded.

The defendants through **Wambua Kigamwa & Company Advocates** submit that the evidence that the grant made to the plaintiff was annulled or revoked renders the plaintiff's title which has roots in the said grant null and void and therefore, canceled. The defendants further argue that the plaintiff obtained grant and confirmation through misrepresentation that led to annulment by the court.

I have considered the pleadings, evidence on record and rival submissions and do find the following

issues ripe from determination:1)-***Whether the plaintiff's title was lawfully acquired.***2)-***Whether the defendants are in adverse possession.*** To determine the first issue thus (1) ***Whether the plaintiff's title was lawfully acquired.*** this court has to look into the history of the title in respect of the land in dispute thus, Uasin Gishu/Kondoo/560 which measures 2.6 hectares. The register was opened on 2.3.2000 in Uasin Gishu/Kondoo registration section. The parcel of land was initially registered in the names of Settlement Fund Trustees of P. O. Box 30450, Nairobi. The said property was transferred to Annah Wanjiku Nduati on the 28.3.2012 and subsequently, transferred in the names of Maina Wahome on the same date and title issued on the same date. On the 13.11.2014, a dispute was entered on the register by the Land Registrar due to a complaint by Miriam Muthoni, daughter of the deceased, Annah Wanjiku Nduati. Before the entries made in the register on 28.3.2013, there were succession proceedings in Eldoret High Court Succession Cause No. 188 of 2010 in respect of the Estate of Annah Wanjiku Nduati who died on 2.5.2000. The grant was made on 21.12.2010 and confirmed on 4.10.2011 and annulled on 24.6.2013 due to fraud and concealment of the material facts. The above implies that since the grant and confirmation of grant were nullified by the court all acts that flowed from them were nullities. Moreover, the registration of the parcel of land in the names of Annah Wanjiku Nduati on 28.3.2012 was a nullity as the said Annah Wanjiku Nduati died in the year 2000 and therefore, had no capacity to hold property on 28.3.2013 as she was dead and that the Settlement Fund Trustees could not legally transfer the property to a deceased person. Furthermore the plaintiff has not demonstrated how the property was transferred from Settlement Fund Trustees to the deceased Anna Wanjiku Nduati and/or the plaintiff. This court is only bound in law to protect property that is lawfully acquired as opposed in this case where there is no evidence that the property was lawfully acquired. The onus is on the plaintiff to prove on a balance of probabilities that the property was lawfully acquired after the defendants gave evidence that the grant was nullified and that the plaintiff's mother died way back in the year 2000 and therefore could not be registered as proprietor in the year 2012.

This court finds that the entries made on 28.3.2012 in respect of the suit land are null and void hence ought to be rectified. I do find that the property was not lawfully acquired by the plaintiff.

2. *Whether the defendants are in adverse possession*

The defendants claim that the suit herein is time barred under section 7 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya as the occupation of the defendants commenced as early as 1992 to date. However, Annah Wanjiku Nduati has never been the legally registered proprietor of the parcel of land. The attempt to make her a registered proprietor on 28.3.2012 was a nullity as she was already dead. It is trite law that adverse possession can only be applied when there is a registered owner of the said parcel of land. At the time the defendants took possession, the legally registered proprietor was the Settlement Fund Trustees against whom the principle of adverse possession does not apply being a government agency and that the interest of the Settlement Fund Trustee in the suit property is not extinguishable under the Limitation of Actions Act. Moreover the principle of adverse possession cannot apply against the plaintiff or Anna Wanjiku Nduati having been registered on 28/3/2012 and therefore 12 years had not lapsed at the time of filing this suit. I do find that the defendants have not satisfied me that they occupied the said parcel of land in adverse possession as against Annah Wanjiku Nduati and or the plaintiff. Conversely, one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession

The upshot of the above is that the suit is dismissed with costs, likewise the counterclaim is dismissed with costs.

DATED AND DELIVERED AT ELDORET ON 15TH DAY OF SEPTEMBER, 2016.

ANTONY OMBWAYO

JUDGE