



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 327 OF 2013**

**MARSELLA JEBITOK**

**RUTO.....PLAINTIFF**

**VS**

**MARY CHEPKURGAT**

**BARAIYWO.....DEFENDANT**

**RULING**

Marsella Jebitock Ruto (*hereinafter referred to as the plaintiff*) brought this matter to court against Mary Chepkurgat Baraiywo (*hereinafter referred to as the defendant*) by way of originating summons for orders that the plaintiff, has become entitled by adverse possession to that land known as **Nandi/Chepkunyuk/422** measuring 1.2 Hectares and that the proprietary rights of the estate of the deceased Jemaiyo Tabletgoi Kerich and/or the defendant have been extinguished and therefore the plaintiff be registered as the sole proprietor of the land in place of the estate of the deceased and/or the defendant.

The Originating Summons is based on grounds that the deceased, Jemaiyo Tabletgoi Kerich sold the entire parcel of land to the plaintiff in 1972. The plaintiff having purchased the land immediately took possession and has continued in uninterrupted possession to date and that the plaintiff's possession prior to the death of the deceased in 2000 was for an uninterrupted period of over 12 years and has been open, uninterrupted and adverse to the deceased and estate of the deceased. The defendant has applied for and obtained a grant of letters of the administration to the estate of the deceased and is therefore capable of being sued on behalf of the estate as the legal representative of the deceased as the parcel of land number Nandi/Ndulele/422 is registered in the name of the deceased. Lastly the plaintiff claims that the plaintiff has acquired proprietary rights over the parcel of land by way of adverse possession hence ought to be registered as the proprietor.

The gist of the supporting affidavit is that the plaintiff purchased land parcel number Nandi/Chepkunyuk/422 on 11/7/1972 from the deceased, Jemaiyo

Tabletgoi Kerich and upon purchase she immediately took possession of the whole parcel of land and the deceased moved away. That prior to the deceased selling her the above parcel of land she had sold other neighboring parcels of land to other people leaving out the above parcel of land which was swampy and adjacent to her property. That the deceased passed away on 28/6/2000 before she had transferred the parcel of land to the plaintiff. Prior to the death of the deceased as above the plaintiff had been in a continuous open and uninterrupted possession of the land for a period of about 28 years and has continued in possession after her death to date. That it was not until recently that the defendant petitioned the court in Eldoret High Court Succession Cause Number 91 of 2010 for a grant of letters of administration. She initially filed an objection which withdrew as she intended to file this suit. That the defendant had been appointed as the administratrix of the estate of the deceased. However the defendant as the legal representative of the deceased refused to recognize her proprietary rights over the parcel of land hence this suit. She contends that neither the deceased nor the defendant have been in occupation of the parcel of land since 1972, in fact the plaintiff is the one who had such possession.

The originating summons was accompanied with an application under certificate of urgency based on the grounds that the defendant/respondent has obtained a title to the property through succession proceedings in Eldoret High Court Succession Cause No. 91 of 2010. The defendant on 26/11/2014 visited the suit property in the company of the county Surveyor Nandi with an intention of surveying, fencing and evicting the plaintiff/applicant from the parcel of land, and have now given notice of visiting the site again after 7 days to carry out their intentions. She is likely to transfer the property to other third parties unless restrained by the court and therefore this suit would be rendered nugatory if this application is not heard urgently and that if an injunction is not granted as prayed the plaintiff will suffer irreparable loss and damage.

In the application by way of notice of motion the plaintiff prayed for orders that a temporary injunction be issued restraining the defendant/respondent, her agents and or servants from selling, transferring, surveying, entering upon, cutting trees, ploughing, fencing, or in any other way interfering with the plaintiff's possession, use and occupation of land parcel No. Nandi/Chepkunyuk/422 pending the hearing and determination of this suit and that the suit be fixed for hearing on priority basis.

The application is supported by the affidavit of the plaintiff who states that she initiated the suit against the defendant claiming ownership by way of adverse possession over land parcel number Nandi/Chepkunyuk/422. That while this suit is pending, the defendant has gone ahead to confirm the grant of letters of administration and transferred the title to herself and that on 26/11/2014 while she was at home in the suit property, the defendant, the County Surveyor Nandi, the Chief and several people hired by the defendant arrived with an intention of surveying, fencing and effectively evicting her from the suit property. When she resisted their actions and told them that this suit was still pending, the county surveyor gave her seven days to show them evidence of an order stopping the survey failing of which he would carry out the survey. The plaintiff states that the defendant's actions of confirming the grant, transferring the title to her name and now threatening to evict her is calculated to defeat the cause of justice and curtail the just determination of this case. She has been in occupation of the land since 1972 to date as stated in the suit hence have a prima facie case with high chances of success. She believes that the balance of convenience tilts in favour of granting the orders sought so as to preserve the subject matter of the suit which has been in her use and occupation since 1972.

In the replying affidavit, the respondent states that she is the niece of the late Jemiyo Tabletgoi Kerich having been born by her sister. She is personally aware that the late Jemiyo Tabletgoi Kerich was married to one Arap Kerich but they were not blessed with any child. The plaintiff's parents sent her to stay with her aunt who was then in occupation of the land parcel number Nandi/Chepkuyuk/422. That due to the old age of Arap Kerich, his relative came and took him to their place of birth at Uasin Gishu Sergoit and later the land which her aunt and Arap Kerich were staying was subdivided into 2 parts. The plaintiff retained the 1.2 Ha which is now Nandi/Chepkunyuk/422 and the portion which belonged to Arap Kerich was Sold by Arap Kerich and his relative to Laurence Leting alias Laurendi Leting who is the brother of the plaintiff. The plaintiff had and still has her portion of the land adjacent to suit land which is on the upper side. That in 1976, the process of official demarcation and settlement commenced and the suit was allocated to current owner.

The respondent claims that due to the old age of the late Jemaiyo Tablegoi Kerich the defendant took her to stay elsewhere with relatives at Kabiyet in 1990 and left one Bernard Birgen to graze his animals and take care of the land for and on behalf of them. In 1997, the late Jemaiyo Tabletgoi Kerich wanted to sell

the land hence went to the said land with John Roritch (deceased), Abraham Koech and Ziporah Jeruto, Gideon Kosgei but unfortunately, became seriously sick and on 28th June 2000 she passed on. That in 2007 the plaintiff removed the fence separating her land with the suit land. The defendant tried to stop her from her illegal act of trespass but she declined despite Provincial Local Administration stepping in and deciding in the defendants favour. That defendant filed succession proceeding in Eldoret High Court Succession Cause No. 91 of 2010 but the plaintiff prematurely filed objection proceedings hence delaying the issuance of the grant which she later on withdrew, paving the way for the defendant to be subsequently issued with grant on 26th April 2013. She denied the allegation that the plaintiff bought the suit land in 1972 since she never mentioned anything in respect to the sale of the land during the life time of the late Jemaiyo Tabletgoi kerich She believes that the agreement to be forgery since the deceased did not sign the same and that the land which she allegedly bought is not mentioned in the purported agreement. What breaks the camels back is that the size of the land is not mentioned.

In his submissions **Mr. Keter** argues that, the plaintiff has along been in possession of the land and that the originating summons was filed after commencement of the succession process but before confirmation of the grant. He argues that the suit should not be rendered nugatory.

**Mr. Kiboi** opposed the application arguing that there is no prima facie case with a probability of success established and that the balance of convenience tilts in favour of the respondent who is in use and occupation of the land. He argues that the plaintiff entered the suit land in the year 2007 by force and not peacefully hence cant be said to be in adverse possession. Moreover, that the parcel of land is not developed.

I have considered the evidence on record and submissions of counsel and being guided by the case of **Giella vs Casman Brown**, I do find that the plaintiff's claim is based on adverse possession and purchase the alleged sale agreement is not signed by any party. No land parcel number is disclosed and therefore the same is not prima facie evidence of ownership. However, the plaintiffs leans more on the claim of adverse possession and not purchase, I believe due to the fact that the alleged agreement of sale is not signed by parties and that there is no consent of Land Control Board.

This court observes that a claim of adverse possession by a relative hangs

on the borderline as relatives of a deceased person are supposed to claim the property of the deceased through succession. Occupying the land with the deceased relative does not in itself give a prescriptive right.

This court finds that there is doubt as to whether the plaintiff has established a prima facie case with a likelihood of success and therefore concludes that this is an application to be decided on balance of convenience which tilts for the time being towards granting an order that both parties to be restrained from dealing with the land in any manner whatsoever until the hearing and determination of the suit. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF MARCH, 2015**

**ANTONY OMBWAYO**

**JUDGE**