



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 42 OF 2008

KIMAGUT ARAP MOGESO.....PLAINTIFF

VERSUS

SIMEON KIPKEMOI MARU.....DEFENDANT

JUDGMENT

(Adverse possession; plaintiff having orally exchanged land with the defendant in the year 1988; no transfer effected; the plaintiff being in quiet occupation since then; suit for adverse possession filed in the year 2008 after 20 years of possession; whether plaintiff ought to be declared to have acquired title by way of adverse possession; judgment entered for the plaintiff)

This suit was commenced on 26th September 2008 by way of Originating Summons taken out pursuant to the provisions of the then **Order XXXVI Rule 3D** of the **Civil Procedure Rules**, equivalent to the current **Order 37** in the **Civil Procedure Rules** of 2010. These provisions allow one to apply to court to be declared owner of certain land by way of adverse possession. This is precisely what the plaintiff wants in the Originating Summons herein. He wants a declaration that he has acquired title by way of adverse possession to the land parcel **Kericho/Kapsuser/2156**. He also wants the said title to be registered in his name in place of that of the defendant.

The defendant did not enter appearance to this suit and neither did he respond to the plaintiff's case. Directions were taken that the suit do proceed by way of viva voce evidence. At the hearing of the suit, the defendant did not show up despite being served with a hearing notice.

The plaintiff testified and called two witnesses. His case is that he owned a **land parcel Kericho/Kapsuser/2226** which was adjacent to a land parcel **Kericho/Kapsuser/2236** owned by the defendant. The defendant became interested in the plaintiff's land and he offered the land **parcel Kericho/Kapsuser/2156** (the suit land) to the plaintiff in exchange for the **land parcel Kericho/Kapsuser/2226**. This they did orally in the year 1988 after which the plaintiff moved into the suit land and the defendant moved into the **land parcel Kericho/Kapsuser/2226**. The defendant even handed over the original title deed of the suit property to the plaintiff. In the year 2008, the plaintiff approached the defendant for a transfer of the land but the defendant refused and complained that they should revert back to their original positions since his land was bigger. This is despite the plaintiff having compensated the defendant with a sum of Kshs. 10,000/= in the year 1988 for the extra acreage.

The plaintiff's evidence was buttressed by two witnesses that he called. They affirmed the exchange and stated that the plaintiff took occupation of the suit land and licenced his son to be on the land. He has been in occupation since the year 1988 to date and has planted tea and developed structures.

The case of the plaintiff is premised upon the doctrine of adverse possession. For one to succeed in a case

of this nature, he has to demonstrate open, quiet and continuous possession for a duration of at least 12 years. This is comprised in the latin phrase, *nec vi, nec clam, nec precario*. Such possession also needs to be accompanied by the necessary *animus possidendi*, or intention to acquire and keep the land as one's own.

I am satisfied from the evidence that the plaintiff and defendant had an oral agreement to exchange their parcels of land and that is how the plaintiff came to be in occupation of the suit property and has been in occupation since the year 1988. His occupation has been quiet, open and notorious. He has occupied the land with the necessary intention to acquire it as his own. To me , he has satisfied the criteria to be declared owner of the suit land by dint of the doctrine of adverse possession.

I therefore allow the plaintiff's case. I declare that the plaintiff has acquired title to the **land parcel Kericho/Kapsuser/ 2156** by way of adverse possession. I further order the defendant to execute all instruments to transfer the said land to the plaintiff, and if he fails to do so within 30 days of this judgment, I direct the Deputy Registrar to proceed to do so.

This suit was instituted because the defendant refused to affirm their exchange of land. The defendant shall therefore bear the costs of this suit.

It is so ordered.

Dated, Signed and delivered on this 29th day of May 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Ms Chelangat holding brief for Mr. J.K. Kirui for Plaintiff

No appearance for Defendant

C/A; Emmanuel