



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L APPEAL NO. 737 OF 2012

Formerly HCA 131 of 2011

JOSEPHINE SOTE KIPCHUMBA.....APPELLANT

V

JOHANA K. KIPCHUMBA.....1ST DEFENDANT

BARNABAS K. KIPCHUMBA.....2ND DEFENDANT

JUDGMENT

Josephine Sote Kipchumba (*hereinafter referred to as the plaintiff*) has taken out an Originating Summons under the provisions of order XXXVII Rule 1 of the Civil Procedure Rules 2010 as they then were but currently order 37 of the CPR 2010 against Johana K. Kipchumba and Barnabas K. Kipchumba (*hereinafter referred to as the defendants*) claiming interest on land parcel No. Tembelion/Elgeyo Boarder Block 4 (Koiwopt Orgut)/136 and Tembelion/Elgeyo Boarder Block 4(Kokwopturgut)137 and pleads with the court to determine three issues thus *whether* by virtue of the fact that she has been in the suit land for over 12 years, she is entitled to the same by way of adverse possession and *whether* the defendants have been holding the suit land in trust for her. *Lastly*, who is entitled to the costs of transferring the suit land to the plaintiff.

The Originating Summons is supported by the affidavit of Josephine Sote Kipchumba who states that both respondents are her sons. Sometimes in late 1960's and early 1970's, she purchased land at Eureka Farm with a group of other individuals and her share was equivalent to 20 acres and each share was worth Kshs.100/= and that by the time she was purchasing the property, the respondents were still in school. During the processing of the titles, the respondents were already adults and she did mention to them that she wanted to sell the land after obtaining the titles in her name. As a family, they requested her to sub-divide the land and have it transferred to them with an option of purchasing it from her. Since she had no suspicious or cause to worry, she transferred the land to them namely:-

- i. ***Tembelio/Elgeyo Border Block 4 (KOKWOPTURGUT) 136*** in the names of JOHAKIM KIBET KIPCHUMBA.
- ii. ***Tembelio/Elgeyo Border Block 4 (KOKWOPTURGUT) 137*** in the names of BARNABAS KIPROTICH KIPCHUMBA.
- iii. ***Tembelio/Elgeyo Border Block 4 (KOKWOPTURGUT) 138*** in the names of JOSEPHAT KIPKOECH CHUMBA.

Prior to the registration of the aforementioned parcels of land, she had been working on the parcels of land and even thereafter she has been carrying out her agricultural work without any hindrance from the defendants. Sometimes later when she realized that the defendants were not interested in buying

the two parcels of land already in their names, she demanded that they transfer the land back in her name. The defendants adamantly refused and they further attempted to obstruct her from utilizing the aforementioned parcels of land. Being a widow, she called several meetings including those chaired by the senior family members and the local provincial administration to no avail. It is only one Josephat Kipkoech Chumba who agreed to transfer back the land to her. The defendants have never worked on the said parcels of land or at all and they therefore have no claim over the same. It is instructive therefore that they have been holding the said parcel of land in trust for her.

Further and alternatively and without prejudice to the foregoing, she claims that she has acquired proprietary rights over the aforementioned parcel of land by way of adverse possession and she should be registered so. She believes that being a housewife did not deprive her of the means to buy the suit land. The plaintiff bought the suit land while being a member of Eureka Farm Society and the suit land thereof is not a family land. The certificate of official search shows clearly that the title deed was issued on 1.11.1996. This is contrary to 2nd defendant claim that the land was acquired in 1967 and registered in his name. The agreement was done in the confidence that the defendants would return the suit land. Indeed one of the son's did return one of suit lands.

The 2nd defendant filed a detailed affidavit whose import is that his mother was a housewife and it is his father who was employed as a driver. The land in issue is family land as the plaintiff/applicant was given money by his father one John Kipchumba Cheserem alias Kipchumba Cheserem for both domestic use and purchase of land because he was away in most cases. The plaintiff reported to him way back in 1967 that the land was bought and registered in the name of the 2nd defendant and no time was it ever agreed or even mentioned to him or the 1st defendant that the plaintiff was supposed to sell the land to the defendants.

He states that the plaintiff used to go to Tambach where his father worked as a driver with the Ministry of Health in the year 1958 upto 1967 but did not purchase the suit property as the property was solely purchased using their father's salary who was working as a police constable and driver. That the registration of land in his favour and that of his brother Johakim K. Kipchumba the 2nd defendant as beneficiaries took into account that the land was bought by his father. That after the transfer was effected, he utilized the land for a short while, upto around the year 2003 when his mother forcefully denied the defendants to use the land.

That his mother did not have the capacity on her own discretion to decide unilaterally that she wanted to sub-divide the land but it was decided by herself and their father. Contrary to the allegations in paragraph 12 of the supporting affidavit, the plaintiff is not a widow, her husband who is their father one John Kipchumba Cheserem alias Kipchumba Cheserem is alive. That since the plaintiff is his biological mother, he and the 1st respondent granted her a licence to use the parcel of land registered in his name and the name of the 1st respondent as the 1st registered owner of Tembeleo/Elgeyo Border Block 4 (Kokwopturgut)136. They denied holding the land in trust for the plaintiff as they are legal owners. The 1st defendant on his part supports the allegation made by the 2nd defendant.

Before I delve into the evidence of the plaintiff, I wish to observe that the defendants conduct has been wanting as they have been appointing advocates without giving them proper instructions and therefore causing unnecessary adjournments. On the 19/8/2011, they appointed Kamau Langat, Co Advocates who ceased acting later citing failure by the defendants to give father instructions. On the 12/7/2013, the defendant appointed M/s Chepseba Lagat and Associates. The said firm of Chepseba applied to cease acting citing failure by the defendants to give instructions. However they did not prosecute the application. When the matter came up for hearing on 3/12/2015, the defendants and their advocate were nowhere near court despite being properly served.

The court having made directions that the matter do proceed by way of *viva voce* evidence, the plaintiff a farmer by profession proceeded by giving evidence under oath in which she states that she stays at Eureka farm in Elgeyo Boarder in Uasin Gishu county. She stated that the respondents are her sons and she had recorded 3 statements and filed a supporting affidavit sworn on 26/7/2011 and urged the court to consider her affidavit and statement. The plaintiff also produced search certificate for land No.

137 and further stated that the lands are in the names of the respondents but she was in possession. Only one son returned the titles. She claimed that Johakim neither gave her the title nor money and refused to transfer the land to her. Johakim swore an affidavit on 11/3/2002 showing that he had undertaken to transfer the property to the plaintiff and the chief also tried to arbitrate on 2/5/2007. The plaintiff prayed that she be given back her land. She is also seeking for for costs and expenses.

I have considered the evidence on record which is not controverted by the defendants. The replying affidavits having been deemed as defences cannot form part of evidence in this matter and therefore do find that the defendered have not offered any evidence. I do find that the plaintiff has been in occupation of the property for more that 12 years uninterrupted after the defendants obtained title to the said property in 1995 and 1996 respectively. She has therefore acquired the right over the land by operation of the doctrine of adverse possession. The court is satisfied that the plaintiff has proved his case on a balance of probabilities and therefore is entitled to the orders sought.

In the alternative, the court finds that the defendants have been holding the suit land in trust for the plaintiff and orders that the trust be dissolved and that the property be registered in the names of the plaintiff. No orders as to costs this being a family dispute. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF JULY, 2015

ANTONY OMBWAYO

JUDGE