



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 14 OF 2014

MUSA KIMENJO MENGICH.....PLAINTIFF

VERSUS

ISAIAH MENGICH.....DEFENDANT

JUDGMENT

On the 21st January 2014 Musa Kimenjo Mengich (*herein after referred to as the Plaintiff*) filed **Eldoret Environment And Land Court Case No. 14 Of 2014**, against Isaiyah Mengich (*herein after referred to as the defendant*) claiming that he is the registered owner of all that piece of land known as NANDI/SARORA/162 (*hereinafter referred to as the suit land*) measuring 0.36 Ha or thereabouts. The Plaintiff avers that the Defendant has claimed and sought to forcefully occupy his said parcel without any justifiable cause, reason and or authority in concert and through harassment, intimidation and threats where the Plaintiff has been bonded by Police from Kabiyeet Police Station, Nandi who has asked the Defendant to move out of his own land.

The Plaintiff avers that the actions, deeds, conduct and behaviour of and by the Defendant both personally and the use of Police and the Local Administration are geared towards grabbing the Plaintiff's land and to cause loss of the land and damage. The Plaintiff's claim against the Defendant therefore is for an Order of Eviction of the Defendant whether by himself or through his Agents, Servants, Nominees, Assignees, Agents or whomsoever claiming through him from the Plaintiff's parcel NANDI/SARORA/162. The Plaintiff's further claim is for an Order of Permanent Injunction restraining the Defendant whether by himself or through his Agents, Servants, Nominees, Assignees Agents or whomsoever claiming through him or acting on his instructions from claiming or dispossessing or depriving the Plaintiff of his parcel NANDI/SARORA/162 and costs of the suit.

Conversely on the 29.1.2014, Isaiya Kemengich filed an Originating Summons being **Eldoret case No. 23 of 2014** against Musa Kimenjo Mengich claiming to be entitled to the whole of land parcel No. NANDI/SARORA/162 through adverse possession and prayed for the determination of the following issues;

- 1. That the applicant Isaiya Kimengich has obtained title by way of adverse possession over the whole of land parcel No. Nandi/Sarora/162 measuring 0.36 hectares having taken continuous uninterrupted possession of the same since 1975.***
- 2. The respondent's title over the whole of land reference Nandi/Sarora/162 measuring approximately 0.36 hectares has been extinguished by dint of adverse possession, thereon by the applicant since 1975.***

3. ***Consequent upon the foregoing the respondent's title over a portion of land parcel Nandi/Sarora/162 measuring 0.36 hectares has been extinguished by operation of law and the same ought to be transferred into the applicant.***

4. ***A vesting order do accordingly issue, vesting land parcel No. Nandi/Sarora/162 measuring 0.36 hectares to the applicant Isaiya Kimengich***

5. ***Consequent upon 1, 2,3 and 4 being granted the respondent be ordered to execute a transfer to the applicant, of the land as he has acquired tile to it under adverse possession failing which the Deputy Registrar of the Environment and Land Court, do execute the transfer documents and the Land Registrar, Nandi County do issue a fresh title deed in the name of the applicant Isaiya Kimengich.***

6. ***The respondent do pay the applicant's costs of the Originating Summons.***

The Originating Summons is supported by the Affidavit of ***Isaiya Kimengich*** who states that sometimes in 1975 he bought the suit-land measuring approximately 0.36 hectares and immediately moved in and built business premises thereon and started doing business and has been in occupation of the land since then to date. In 1975 before the title deed was issued he put up a fence round the land and. However, on 3.2.1983 the suit land was registered in the name of the plaintiff. He claims to have peacefully utilized the suit-land since 1975 in an open and uninterrupted occupation adverse to the plaintiff's interest. The plaintiff has not managed to evict him nor assert the proprietary right to the suit-land. He claims that the plaintiff's title to the land reference Nandi/Sarora/162 has been extinguished and that he has acquired title to the suit land by operation of law by virtue of adverse possession and that the respondent has lost the right to claim the land by virtue of the Limitation of Actions Act.

On the 6th February, 2014 the plaintiff filed a replying affidavit in the Originating Summons stating that the defendant does not merit the orders being sought as he (***plaintiff***) was the registered proprietor of the suit land and had a Land Certificate to that effect. That the defendant is indeed a trespasser and has been so since his license to be on the land was withdrawn. That the continued stay by the defendant on the land has been through force, threats and intimidation and in collision with the local administrators the plaintiff was locked up at Kabiyet Police Station on the 19.11.2013 subsequently bonded with a sum of Kshs.100,000/= being the cash bail. He was compelled to produce a Certified copy of the Register and the Title deed over the said land which necessitated the refund of the cash bail before being arraigned in court. He claims to have resisted and objected to the forceful occupation and possession of his land by the Applicant. He claims to have obtained the title to the property after buying the same and subsequently invited the defendant who is a close relative, to operate a Posho Mill since there was none nearby. That after the defendant stopped paying rent there have been several cases over the same but the defendant has been evasive. He constructed the business premises and not the defendant as at the time of construction the defendant was doing his business at Kapchumo Centre and not Kipkombat Centre where this land is.

In his defence to suit NO. 14 of 2014, the defendant (Isaiah Mengich) states that the Plaintiffs claim on the land has been extinguished as the defendant has been on the land since 1975 and fenced and utilized the same. On the 18.2.2014, the two suits were consolidated and direction given that proceedings be undertaken in *E&L NO. 14 of 2014*.

The Plaintiff, Musa Kimenjo a retired cook, testified that he is 72 years and that the defendant is his first cousin. He bought the suit land from George Chepsiror and constructed a shop. The defendant rented his shop on the land as he had closed his at Lolkorinyet. At the time the defendant rented his shop the Plaintiff did not have title. He rented the shop for Kshs.500 per month but stopped paying in the year 2007 in the Month of July. They have no agreement in writing as their agreement was between two gentlemen who are cousins. He demanded for his shop back but the defendant refused to hand over and claimed to have sold the same. According to the plaintiff, the land belongs to him as he has the title deed and that defendant is a tenant who refused to vacate when required.

On cross examination by Mr. Momanyi, he states that he has no agreement, he has no witness, he has no

evidence of the claim that the defendant was his tenant, no evidence of receipts of payment of rent.

On re-examination by Mr. Choge, he reiterates that they did not do a written agreement but it is a gentlemen agreement.

The Plaintiff closed his case without calling any witness and prayed that the suit be allowed and judgment be entered against the defendant.

Upon the close of the Plaintiffs case and opening of the defence case the defendant testified that he is a farmer by profession and a first cousin to the Plaintiff. He claims to have entered the suit land in 1975. He went home for a holiday when George Chepsiror invited him to buy his unregistered land. He took possession and was given permission to construct. He did a house, a toilet and put in a posho mill in 1975. The Plaintiff was his employee. He has fenced the land and has ploughed part of it. He claims to have been in possession when the Plaintiff was being registered. He has been in possession as a buyer and an owner, he has never paid rent and never received a demand notice since he bought the land. He has been in possession for 40 years since 1975 and 30 years after the Plaintiff was registered in 1983 and title issued in 1985. He prayed that the Originating summons to be allowed. **On cross examination by Mr. Choge**, he reiterated what he said in his evidence in chief.

DW2 known as Kipkemboi Koskei a farmer by profession was a village elder in 1975 and knows the Plaintiff and Defendant as cousins. He was categorical that in 1975, the plaintiff was an employee of the defendant and that in said year the defendant bought land from George Chepsiror measuring half an acre for Kshs.900 and occupied the same. He fenced the land, put up a posho mill, pit latrine. Koskei has not seen the Plaintiff on the land other than when he was an employee of the defendant.

On cross examination by Mr. Choge, he testifies that the land was bought before adjudication and the number given later but in the name of the Plaintiff.

Dw3, Jamin Kugun Suben states that he is a resident of Cheptoyet village, Kabiyet location Nandi county and a farmer by profession. He used to work for the defendant. The Plaintiff was also an employee of the defendant.

In 1978, they went with the wife of the defendant and Dw2 to George Chepsiror and bought the suit land. The defendant's wife had the money. Immediately upon purchase, the defendant fenced the land, started to construct a toilet, a shop and put up a posho mill. He does not know how the plaintiff got the title.

Upon close of the defence case, the Plaintiff submitted **through Mr. Choge learned counsel** that he has a title to the property by way of original land certificate. According to Mr Choge to impeach a title of a registered proprietor of land, fraud must be attributed to the proprietor directly. The Plaintiff submits that he has proved his case on a balance of probability and therefore judgment should be entered in his favour.

The Defendant on his part submits that judgment should be entered in his favour as he has proved by virtue of adverse possession he acquired title to the land.

I have considered the evidence on record and the rival submissions and do find that the Plaintiff is the registered proprietor under the Registered Land Act Cap 300 Laws of Kenya (Repealed) of land title No. Nandi/Sarora/162 as the absolute proprietor of the land comprised in the said title, subject to the entries in the registry relating to the land and to such of the overriding interests set out in Section 30 of the Registered Land Act (Repealed) as they have subsisted and affected the land. The plaintiff was registered as proprietor on the 3rd February 1983 and the land certificate was issued on the 22.3.1985.

Unfortunately, the plaintiff never occupied the land. The Plaintiff never called for any evidence other than his testimony that he bought the land from George Chepsiror. He did not prove to this court that he obtained the land certificate in any lawful manner. This court finds that it is not enough to have a title document and claim to be the owner of the parcel of land. It requires proof thereof that the title document

was obtained by some lawful means.

The defendant's defence is that he has been in occupation of the land since 1975 to date and therefore has acquired the right to the property due to adverse possession. The defendant called two witnesses who I find to have been valuable in giving facts of the matter, as **Dw2** the elder who witnessed the defendant buy the land from George Chepsir and **DW3** who worked for the defendant for 10 years. The plaintiff fenced the land, installed a posho mill, constructed a toilet and carried on business on the suit land.

The law on adverse possession is very clear and settled. The occupation and use of the property must be (a) open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. (b) Continuous use of the property – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. (c) Exclusive use of the property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. (d) Actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by *clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock* and constructing buildings or other improvements. If the property is residential, such actions may include *mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures* (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. (e) Non-permissive, hostile or adverse use of the property – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: *Objective view*—used without true owner's permission and inconsistent with true owner's rights. *Bad faith* or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. *Good faith* view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title.

I do find that the Plaintiff has not proved his case on a balance of probability and therefore the suit is dismissed with costs while the defendant has proved that he was in an uninterrupted, quiet, peaceful occupation of the suit land for more than 12 years after the Plaintiff was registered as the proprietor of the land in dispute on the 3.2.1983. Moreover I do find that the defendant's entry in the suit-land was non-permissive having purchased the property from a 3rd party and that the defendant has proved that he has been in adverse possession of the parcel of land hence the Originating Summons in 23 of 2014 filed on 29.1.2014 is allowed in the following terms.

- 1. That the defendant, Isaiya Kimengich has obtained title by way of adverse possession over the whole of land parcel No. Nandi/Sarora/162 measuring 0.36 hectares having taken continuous uninterrupted possession of the same since 1975.***
- 2. The respondent's title over the whole of land reference Nandi/Sarora/162 measuring approximately 0.36 hectares has been extinguished by dint of adverse possession, thereon by the applicant since 1975.***
- 3. Consequent upon the foregoing the respondent's title over a portion of land parcel Nandi/Sarora/162 measuring 0.36 hectares has been extinguished by operation of law and the same ought to be transferred into the applicant.***
- 4. A vesting order do accordingly issue, and is hereby issued vesting land parcel No. Nandi/Sarora/162 measuring 0.36 hectares to the defendant Isaiya Kimengich***
- 5. Consequently, the respondent is hereby ordered to execute a transfer to the applicant, of the land as he has acquired title to it under adverse possession failing which the Deputy Registrar of the Environment and Land Court, do execute the transfer documents and the Land Registrar, Nandi County do issue a fresh title deed in the name of the defendant Isaiya Kimengich.***
- 6. The plaintiff do pay the defendant's costs of the Originating Summons and the dismissed suit.***

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF NOVEMBER, 2015

JUSTICE OMBWAYO ANTONY

ENVIRONMENT AND LAND COURT AT ELDORET