REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 168 OF 2012

Formerly HCC No. 91 OF 2004 (OS)

KIPTANUI A. CHUMA.....PLAINTIFF

VS

KIBOR A. KOLIL.....DEFENDANT

(Adverse possession; requirements to sustain a claim for adverse possession; plaintiff claiming to have purchased the whole of the suit land in 1971; suit filed in 2004; dispute over whether full payment of the purchase price was made; whether the same is relevant to the claim for adverse possession; need to prove factual occupation; evidence of plaintiff not clear on the exact portion of land occupied; defendant asserting that he occupies half of the suit land; whether claim for adverse possession can be sustained for part of the suit land; judgment entered for the plaintiff for half of the suit land)

JUDGMENT

PART A : INTRODUCTION AND PLEADINGS

1. This suit was commenced on 16 July 2004 by way of Originating Summons taken out pursuant to the then Order XXXVI Rule 3D of the Civil Procedure Rules and Sections 17 and 30 of the Limitation of Actions Act (CAP 22) Laws of Kenya and Section 5 and 3A of the Civil Procedure Act. The applicant (whom I will refer to as the plaintiff) sought for the following orders :-

(a) That this Honourable Court do declare that the proprietor's interest in land parcel number Nandi/Chepkogony/89 situated in Nandi District be extinguished.

(b) That the applicant Kituanui A. Chuma be registered as the absolute proprietor of the said parcel number Nandi/Chepkogony/89.

(c) That this Honourable Court be pleased to make such alternative or further orders as it may deem fit and equitable.

(d) That the costs of this application be awarded to the plaintiff.

The suit was founded on the following grounds :-

(i) That the plaintiff has been in possession and has lived on the said parcel of land Nandi/Chepkongony/89 since 1971.

(ii) That the said possession and/or occupation has been open, notorious, adverse, continuous and undisturbed since 1971.

(iii) That the plaintiff has developed the land substantially.

2. The Originating Summons is supported by the affidavit of the plaintiff. In the said affidavit, it is inter alia deponed that the plaintiff bought the land parcel Nandi/Chepkongony/89 (the suit land) comprising 8 acres in 1971 or thereabout from the respondent (defendant) and took possession of the same immediately. He has further deponed that he has remained in quiet, exclusive, uninterrupted and continuous occupation and possession of the said land since 1971 to date. He has further deponed that the defendant has never lived nor taken possession of the suit land since 1971. He has stated that the defendant consented to the transfer of the said land to him in the year 1978 but has failed to surrender the title deed. He has therefore sought to have the land declared his, by way of adverse possession.

3. The defendant entered appearance and filed a replying affidavit to the plaintiff's claim. In his replying affidavit, he stated that he sold the suit land of 8 acres to the plaintiff together with a house on 31 August 1971 for a total consideration of Kshs. 4,990/=, of which, the plaintiff paid Kshs. 2,020/=, leaving a balance of Kshs. 2,070/= which remained unpaid. He annexed a copy of a sale agreement. He deponed that he then went and purchased another land parcel in Kabiyet area for Kshs. 4,000/=, of which he paid Kshs. 2,020/= leaving a balance of Kshs. 1,980/=, which he was to clear after receiving the sale proceeds of his land. Since he was never paid by the plaintiff, he was unable to pay the vendor of the land in Kabiyet, and the said vendor rescinded their agreement, and evicted him from the said land in 1972. After he was evicted, he went back to the suit land, reclaimed possession and constructed houses and he has been resident on the said land to date. He has denied that the plaintiff has been having quiet possession as he has always requested the plaintiff to take back his Kshs. 2,020/= and vacate the suit land. He has stated that he has been cultivating tea and grazing on the land and that it is his family which has been in uninterrupted possession. He has averred that the sale agreement between himself and the plaintiff was never referred to the Land Control Board and no consent was ever issued. He has claimed that the plaintiff has forcefully occupied part of the suit land despite being offered a refund and that the plaintiff's developments were undertaken despite his protests and objections. He also stated that the plaintiff has failed to annex an extract of the register in his application. He has asked that the case of the plaintiff be dismissed.

4. Directions were taken that the suit do commence by way of viva voce evidence and after a considerable amount of delay, the trial eventually commenced on 18 September 2013.

B. EVIDENCE OF THE PARTIES

(i) Plaintiff's Evidence

5. The plaintiff testified as PW-1. He testified that he purchased the suit land in the year 1971 and produced a copy of the agreement. He stated that he bought 8 acres, the purchase price being Kshs. 600/= per acre. He testified that he paid the purchase price and remained with a balance of Kshs. 400/=, which he said, the defendant informed him to pay after the land was transferred to him. He stated that he however paid the Kshs. 400/=. He testified that the defendant vacated the land in 1971 but that he later came back but to another land. He testified that an application for consent of the land control board was made and consent to transfer obtained. He testified that a transfer was drawn and his name entered in the register but that he still does not have the title deed. He testified that there was a criminal case over the same matter of which he produced the proceedings. He said that he has developed the land, planted tea and lives on it with his family. He said that the defendant's wife has previously disturbed him but he could not recall when. He said that the defendant also attempted to come into the land but he chased him away. He could however not recall when this happened. He also said that the defendant keeps coming to him asking him to sub-divide the land and give him a portion.

6. In cross-examination PW-1 agreed that apart from the agreement he produced, there was another subsequent agreement which he did not produce, and he also agreed that the subsequent entries to the agreement that he produced (which show subsequent payments), were made in the absence of the defendant. He also said that on the day of the agreement he paid Kshs. 3,000/=, although what is stated in the agreement is Kshs. 2,020/=. He however insisted that he has paid the whole purchase price. He denied that the defendant came back to the land in the year 1972 and insisted that he lives in an adjacent land. He denied that the defendant lives on 4 acres of the suit land and stated that he occupies 0.3 acres of the adjacent land. He was aware that the defendant had charged the land to Agriculture Finance Corporation (AFC) at some point. He also insisted that they went to the Land Control Board and agreed that the matter had at some point been referred to the Land Disputes Tribunal. He agreed that the Tribunal had decided that he be given 5 acres but he was not happy with that decision. He agreed that they had several cases since 1971 touching on the ownership of the said land and agreed that he had also referred a criminal case against the defendant. The dispute had also been heard before the village elders, Assistant Chief and District Officer.

7. PW-2 was Esau Aloo Odero, the Lands Registrar Nandi County. He had been called by the plaintiff to produce the application for consent, letter of consent and transfer of the suit land. He stated that he could not however produce the same since he was not certain of their authenticity. None of these documents had ever been presented for registration. His other evidence was that the land was first registered in the name of the defendant in the year 1969 when he was called Kibitok arap Kolil which name he changed to Kibor Kolil in 1977. On 21 April 1978, the AFC charged the land to secure a loan of Kshs. 16,000/= and to date the same has not been discharged. On 21 February 2005, the plaintiff lodged a caution claiming purchaser's interest. PW-2 did not complete his evidence in chief since counsel asked that he be stood down to enable him verify the consent, letter of consent and transfer. He was stood down, but despite numerous adjournments, the plaintiff was never able to secure his attendance to complete his evidence.

8. PW-3 was one Joseph Abel Kiprono Tanui who described himself as son to the plaintiff. He testified that the plaintiff bought the suit land from the defendant in 1971 at a consideration of Kshs. 4,950/=. He said that the money was paid, save for a balance of Kshs. 440/=, which was never paid. He said that the defendant asked to be given one acre out of the 8 acres to cater for the unpaid balance. He could not recall when this was agreed, but he said that it was around 1976-1977. He said that the plaintiff allowed him use of one acre. He testified that from the year 1971 they have been residing on the suit land and have built a house and planted tea. He was aware of a loan to AFC which he said was security for money given to one arap Kirongo sometime in 1972-1973. He said that the court should give the defendant one acre of the suit land and 7 acres to them.

9. In cross-examination, PW-3 stated that he is the one who wrote down the agreement between the plaintiff and defendant in the year 1971. He reiterated that the purchase price was Kshs. 4,950/= and stated that Kshs. 2,000/= was paid on the date of the agreement. He agreed that if this was the case, it left a balance of kshs. 2,950/=, which he said was paid, but he could not recall when. He reiterated that only a balance of Kshs. 440/= was left. He was pushed that he knew nothing about the land and admitted that he lives in Kericho, but stated that his children live on the suit land. He agreed that there have been disputes over the suit land. He reiterated that they have allowed the defendant use of one acre of the suit land where he ploughs maize, but that he resides in a neighbouring parcel of land.

10. PW-4 was one Tiongei Tangus. He testified that he was a witness to the agreement through which the plaintiff bought the suit land. He testified that on the day of the agreement, the plaintiff paid the sum of Kshs. 4,950/=. He did not know if any balance was left. He testified that the plaintiff lives on the whole of the suit land. In cross-examination, it emerged that PW-3 lives three villages away from the suit land. He was not aware that the dispute between the plaintiff and defendant had been referred to the Chief or village elders. His chief is of a different area. The proceedings in criminal case no. 1996 of 2005 were put to him and it was pointed out that in the said proceedings, he testified that only Kshs. 2,000/= was paid, but he insisted that it was Kshs. 4,950/= that was paid. He said that since the agreement, he has never gone back to the suit land.

11. As I earlier stated, PW-2 was never recalled to finalize his evidence, despite me allowing the plaintiff

several opportunities to do so. I was unable to bring myself to accord the plaintiff any further accommodation and the plaintiff closed his case with the above evidence.

12. The defendant testified as the sole witness. In his evidence, he agreed that he sold the whole of the suit land to the plaintiff in the year 1971. He said that the price was Kshs. 600/= per acre, thus Kshs. 4,800/= in total. He said that he was only paid Kshs. 2,020/= and no more money. He then moved to Kabiyet, but he had to come back to the suit land as the vendor of the Kabiyet land reclaimed possession after he failed to complete the purchase price. He offered to refund the plaintiff but the plaintiff declined. He said that they live side by side on the suit land and that he uses 4 acres of it. He said that they have lived this way since 1971. He stated that they had earlier referred the dispute to the village elders, Chief and District Officer. The plaintiff also filed the criminal case Kapsabet Criminal Case No. 1996 of 2005 but he was not convicted. He produced a copy of the title deed together with the register and the proceedings in criminal case No. 1996 of 2005. He refuted that he ever went to the Land Control Board. In cross-examination, the defendant stated that the plaintiff does not live on the land but that it is his children who reside on it. He said that they have not lived in peace. He reiterated that he has been on the suit land since his return in the year 1971 although it was pointed to him that his replying affidavit states the year 1972.

C. SUBMISSIONS OF COUNSEL

13. In his submissions, counsel for the plaintiff submitted that the plaintiff's occupation of the suit land has been open and uninterrupted since the year 1971. He argued that the evidence of the defendant was not corroborated. He also submitted that there was no proof that he ever bought land in Kabiyet. He relied on several authorities which I have considered. Finally he submitted that although the case was of adverse possession, in the alternative , the court ought to consider granting an order of specific performance or compensation at current market rates.

14. On the other hand, counsel for the defendant submitted that it had not been proved that there had been actual dispossession which continued for a duration in excess of 20 years. He submitted that the evidence demonstrated that they were both in possession of the same land and therefore there was no exclusive possession, and that this destroys a claim for adverse possession. He also submitted that it was not clear who among the family of the plaintiff was in possession of the suit land. He further submitted that it was never proved that the whole purchase price had been paid. He relied on several authorities, in support of his case which I have also considered.

D. DECISION

15. The case before me is one of adverse possession. There is no case for specific performance. I cannot, as submitted by counsel for the plaintiff, go into the issue of whether or not an order of specific performance on the agreement of 1971 can be granted, for I do not have such pleadings before me. If I am to delve into the issue, then I will be deciding a matter in which the defendant has not been given opportunity to defend. The case that the defendant has prepared himself to defend is one of adverse possession and no more. It is trite law that parties are bound by their pleadings, and the pleadings herein are not pleadings asserting title by way of purchase, but are pleadings that assert title by way of adverse possession.

16. For one to prove adverse possession, he must demonstrate that he has been on the claimed land *nec vi, nec clam, nec precario*; that is, without force, without secrecy (open possession), and without permission. Such possession must also be accompanied by the necessary *animus possidendi* which is an intention to acquire the said land. The case of the plaintiff is that he moved into the said land after the same was sold to him in the year 1971. I have seen the agreement for sale. It is dated 31 August 1971 and it is between the plaintiff and defendant. The purchase price is Kshs. 4,950/= and it is noted that an amount of Kshs. 2,020/= has been paid. The balance is noted to be Kshs. 2,930/=. There are some subsequent endorsements showing payments of Kshs. 780/= on 23/9/1971, Kshs. 340/= on 15/11/1971 and another undated payment of Kshs. 340/=. There is noted to be a balance of Kshs. 440/=. It is not clear if the latter payments, after the initial payment of Kshs. 2,020/= were ever made, for I have not seen an endorsement

by the defendant on the document itself. Despite PW-3 stating that the full purchase price was paid on the day of the agreement, it is clear that this cannot be the position. There is therefore no doubt that the whole of the purchase price was not paid by the plaintiff. The agreement of the parties was an agreement over agricultural land and there needed to be a Consent of the Land Control Board. There was no proof tendered before me that the Land Control Board ever gave consent.

17. This to me, does not however affect the plaintiff's right to claim adverse possession. Since the agreement was subject to the consent of the Land control board, it became void 6 months thereafter, and any possession after that, is possession that can be calculated to the twelve years required to sustain a claim for adverse possession. The issue of payment of the full purchase price is a consideration where the plaintiff claims to have entered into possession by virtue of purchase. If the land is not subject to the Land Control Act, then time starts running after the full payment of the purchase price (see ***Bridges v Mees (1957) 2 All E.R 577***), for it is assumed that the seller has merely given the buyer a licence to occupy the land subject to payment of the full purchase price. However, if the land is subject to the consent of the land control board, and full payment has not been made, and no consent of the Land Control Board is given, the agreement becomes void 6 months thereafter. Any possession continued thereafter is therefore not possession that is the subject of the agreement (for the same has been nullified by operation of law) and can be calculated towards the required 12 year period. This position was affirmed in the cases of ***Public Trustee v Wanduru (1984) KLR 314*** and ***Erick Chepkwony Aengwo v Jonathan Rutto Kibiesang Eldoret E&L Case No. 743 of 2012 (2013) eKLR*** which succinctly explains the position of the law. For our case it does not matter that full payment was not made. It is not disputed that the plaintiff went into possession immediately or soon after the agreement of 1971. He has therefore been in possession for a duration in excess of a period of 12 years, prior to the filing of the suit, which was in the year 2004. He certainly moved into possession with the intention to have the land as his own, thus the requisite *animus possidendi* was present.

18. The other question is whether such possession was continuous and uninterrupted. On this score, the evidence is not very precise. The evidence tabled by both plaintiff and defendant are in agreement that at some point, most likely the year 1972, the defendant did come back and did attempt to take over the suit land. The defendant himself testified that he did take possession of 4 acres of the land. The evidence of the plaintiff is not very clear. The plaintiff himself testified that when the defendant came back, he did not occupy the suit land, but occupied another adjacent land. This is contradicted by the evidence of PW-3 who stated that the defendant was allowed to occupy one acre only which he still occupies to date. The proceedings of Kapsabet Criminal Case No. 1996 of 2005, which were produced as an exhibit, has the evidence of PW-4 , stating that the plaintiff and defendant herein live together on the disputed land. No party produced a valuation report to demonstrate the occupation of the ground.

19. I saw the witnesses and their demeanour. I do not find the evidence of the plaintiff to be consistent as to the amount of land that he occupies. The evidence of each plaintiff's witness was different as to the quantum of land occupied by the plaintiff. Although the defendant did not bring an independent witness to corroborate his evidence, I found him to be forthright, and I do believe his evidence that he has been in possession of 4 acres of the suit land.

20. It was argued by Mr. Kipkoske Choge, counsel for the defendant, that since possession was not exclusive for the entire land, then the claim for adverse possession must fail. This cannot be so. A similar argument had been made in the case of ***Githu v Ndeete (1984) KLR 777***. The Court of Appeal however held that it was permissible for a person to claim adverse possession to an identifiable portion of the land and does not have to claim the whole of the said land. What the applicant therefore needs to prove, is exclusive possession of the area that he claims to have acquired by way of adverse possession, and such area need not be the whole of the land.

21. It must of course be proved that the possession of the plaintiff was peaceful. Mr. Choge attempted to demonstrate that the possession of the plaintiff was never peaceful as there were numerous cases over the suit land presented at different forums. The only proof of a dispute that was tabled was the criminal case in Kapsabet. In that case, the defendant was charged with the offence of Obtaining by False Pretenses contrary to Section 313 of the Penal Code. The particulars of the charge were that he obtained Kshs.

4,950/= by falsely pretending that he was in a position to sell land to the plaintiff. It will be seen that that was a case in which the plaintiff was complainant. I have not been given any proof of a case in which the defendant was complainant and in which he was suing the plaintiff for eviction out of the suit land. The evidence tabled demonstrates that it was the plaintiff who was attempting to seek help to get back his land. There would have been interruption if the defendant had himself filed a suit, and such suit, if filed before expiry of 12 years could have had capacity to destroy the claim for adverse possession a position that was explained in the case of ***Njuguna Ndatho v Masai Itumo (2002) eKLR.*** There needs to be an active step by the land owner to evict the possessor. The facts of this case do not show any active step taken by the defendant to remove the plaintiff from the suit land. I do not therefore have any evidence to show that the possession by the plaintiff of the suit land was not peaceful. There had been mention of a Land Dispute Tribunal decision which the plaintiff was not happy with, but the proceedings were never produced in evidence in this case.

22. From the above, it is my view that the plaintiff has only been in quiet possession of 4 acres of the suit land. It is only this area, that to me, he has proved a claim for adverse possession. I will therefore enter judgment for the plaintiff for an area of 4 acres of the suit land.

23. As to costs, the plaintiff has only proved half his claim and I think it is best that each party bears his own costs.

24. There had been mention that the land is charged to AFC but I have looked at the Green Card produced and the original title deed and I have not seen any charge registered over the suit land. The land is therefore not under any registered encumbrance.

25. From the foregoing, I make the following final orders.

(a). That the plaintiff be declared to have acquired by way of adverse possession 4 acres of the land parcel Nandi/Chepkongony/89.

(b) . That the said land be sub-divided into two portions of 4 acres each, subject to any adjustments for roads of access or other amenities, and the plaintiff and defendant be registered as owners of the respective parcels of land.

(c). That each party bear his own costs.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. H.O. Aseso holding brief for Mr. Kagunza for plaintiff.

Mr. E.W. Ayieko holding brief for Mr. Kipkoske Choge for defendant.