



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO 268 OF 2013 (OS)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, 2010

AND

**IN THE MATTER OF THE LAND PARCELS KNOWN AS NANDI/KAPTEL/1890 AND
NANDI/KAPTEL/51**

BETWEEN

ALFRED KIPSANG SUSWAPLAINTIFF

VERSUS

KIRONGO ARAP NGETICH.....DEFENDANT

JUDGEMENT

(Suit for an order that the applicant has acquired title to a portion of land by way of adverse possession; suit uncontested by the respondent; applicant having deposed to have been in occupation of the portion claimed since the year 1972; facts uncontroverted; judgment entered as prayed for the applicant with no orders as to costs)

This suit was commenced by way of Originating Summons taken out under the provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010, and Section 38 of the Limitation of Actions Act, CAP 22, Laws of Kenya. It is the case of the applicant that he has acquired title to 4 acres out of the land parcel originally known as Nandi/Kaptel/51, but now comprised in the land parcel Nandi/Kaptel/1890, by way of adverse possession. The applicant (also described as plaintiff) in his Originating Summons (O.S) framed the following questions for determination :-

- 1. Whether the plaintiff has been in open, uninterrupted occupation and without the consent of the defendant of 4 acres comprised in the parcel known as Nandi/Kaptel/51 currently Nandi/Kaptel/1890.*
- 2. Whether the plaintiff's occupation of the 4 acres of the land parcel known as Nandi/Kaptel/51 currently Nandi/Kaptel/1890 has been for a period of over 12 years.*
- 3. Whether the defendant's title to the 4 acres comprised in the parcel known as Nandi/Kaptel/51 currently Nandi/Kaptel/1890 has been extinguished by the plaintiff's adverse possession.*

4. *Whether the defendant ought to execute instruments to convey 4 acres of the land parcel known as Nandi/Kaptel/51 currently Nandi/Kaptel/1890 to the plaintiff in default of which the Deputy Registrar of the Honourable Court or such other officer as the Honourable Court may designate do execute the same.*

5. *Whether the plaintiff is entitled to the costs of the suit from the defendant.*

The O.S is supported by the affidavit of the applicant. The applicant has deponed that the respondent (also described as defendant) was the registered proprietor of the land parcel Nandi/Kaptel/51 which measured 5.8 Hectares. He has deponed that he commenced occupation of the land on 11th October 1972 and that he has been in exclusive occupation of the said 4 acres to date without interruption. He has contended that the defendant's right to the 4 acres became extinguished twelve years later in the year 1984. He has averred that his occupation has been in the open, without secret, and without the permission of the defendant. He has deponed that he has made substantial developments on the suit land, has constructed a house, keeps cattle and grows food on the land. He has further averred that in the year 2009, the defendant sub-divided the land parcel Nandi/Kaptel/51 to create the land parcel Nandi/Kaptel/1890 and has contended that the sub-division does not affect his rights to claim adverse possession. To his affidavit, the applicant has annexed a certified copy of the register of the land parcel Nandi/Kaptel/51 and Nandi/Kaptel/1890, and a letter from the Chief of Sangalo Location, to confirm his occupation of the land.

The respondent never filed any response to the O.S despite being served. I directed the O.S to proceed by way of affidavit evidence and for counsel to make submissions if any. Mr. Barasa for the applicant, submitted that the applicant is entitled to be declared the owner of the 4 acres of land that he has been in occupation of. He relied entirely on the uncontroverted facts set out in the affidavit of the applicant.

I have considered the applicant's case. The pleadings are uncontested by the respondent. The applicant has stated that he has been in occupation of 4 acres of the suit land since the year 1972 and that his occupation has been quiet and open and without the permission of the registered owner. I have nothing before me that would make me doubt the assertions of the applicant. As I have mentioned before, the pleadings and averments of the applicant have not been challenged by the respondent.

I have seen the annexed certified copy of the register to the land parcel Nandi/Kaptel/51. The respondent became registered as owner of the said land on 11 October 1972. On the 9 January 2009, the said land parcel was sub-divided into three parcels of land being Nandi/Kaptel/1890 , 1891 and 1892. It is the case of the applicant that he has been residing in 4 acres of land which now falls within the land parcel Nandi/Kaptel/1890. The land parcel Nandi/Kaptel/1890, which is the subject matter of this suit measures 4.40 Hectares (about 11 acres). The applicant is therefore only claiming a portion of the land parcel Nandi/Kaptel/1890. I see no reason why I ought not issue an order that the applicant has acquired title to 4 acres of the said land by way of adverse possession.

Section 38 of the Limitation of Actions Act, CAP 22, provides as follows :-

38. (1) *Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.*

(2) *An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.*

(3) *A proprietor of land who has acquired a right to an easement under section 32 may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.*

(4) *The proprietor, the applicant and any other person interested may apply to the High Court for the*

determination of any question arising under this section.

(5) The Minister for the time being responsible for land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

S.38 (1) allows a person claiming to have acquired land by way of adverse possession to apply for such order if the said land is one of those registered under S.37 of the Act.

Section 37 provides as follows :-

37. This Act applies to land registered under the Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except that -

(a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;

(b) an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.

The subject land parcel is land registered under the Registered Land Act (CAP 300) (now repealed by the Land Registration Act, Act No.3 of 2012). It is therefore land that is registered under a regime by which a person can claim entitlement to registration by way of adverse possession.

It is my view that the applicant's case must succeed. I therefore answer the first four questions drafted by the applicant in the affirmative. In summary I declare that the applicant is entitled to registration of 4 acres out of the land parcel Nandi/Kaptel/1890 having acquired title to the same by way of adverse possession. I direct the Deputy Registrar to execute all instruments necessary to convey four acres of the suit land to the applicant. The applicant will however pay all requisite charges and conveyance fees.

As to costs, I feel that in the circumstances of the suit, I ought not to make any order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. Y.M. Barasa of M/s Wambua Kigamwa & Co for the applicant.