



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 964 OF 2012

Formerly HCC 351 OF 2004

RICHARD KIRAGU MWAURA & ANOTHER.....PLAINTIFF

VS

DAVID KIPROTICH ARAP TOO & ANOTHER.....DEFENDANT

JUDGMENT

This judgement is in respect of the Counterclaim raised by the 1st defendant against the plaintiffs, as the main suit, being the claim of the plaintiffs against the defendants, was dismissed for want of prosecution. However, to understand the nature of the Counterclaim, I will have to briefly lay out the case of the plaintiffs.

The plaintiffs herein instituted this suit on 8 April 2004, against the defendants, seeking to have the defendants declared trespassers in the land parcel Kakamega/Sergoit/44 and for a permanent injunction to restrain the defendants from interfering with the said land. The 1st plaintiff is donee of a power of attorney from the third plaintiff, who is the registered owner of the suit land. The second plaintiff was tenant of the 3rd plaintiff, having agreed to a five year lease from 2nd January 2000. It was pleaded in the plaint that the 1st defendant through Eldoret CMCC No. 371 of 2004, obtained ex-parte orders of injunction and on 16th March 2004, moved into the premises, and evicted the 2nd plaintiff, and placed the 2nd defendants who are a security firm, on the land to guard it. When the application that gave rise to the order came up for inter-partes hearing, the 1st defendant withdrew the entire suit but failed to vacate the land nor remove the security guards. That is what prompted the plaintiffs to file this suit.

The 2nd defendant never entered appearance to this suit. The 1st defendant upon service, filed a statement of defence and a counterclaim. In the statement of defence, the 1st defendant denied ever having obtained injunctive orders vide Eldoret CMCC No.371 of 2004 and asserted that he has been in occupation of the suit land since the year 1967. He averred that he has an established home and carries out farming on the land every year. In his counterclaim the 1st defendant sought orders of adverse possession of 60 acres which he claimed to have been in possession of since the year 1967. He also sought costs of the counterclaim.

The plaintiff never set down the suit for hearing, which prompted an application by the 1st defendant, for dismissal for want of prosecution, which was allowed on 17 November 2011. The matter was then fixed for hearing of the counterclaim. The hearing of the counterclaim proceeded ex-parte, as the firm of V.A. Nyamodi & Company Advocates, who are on record for the plaintiffs, never attended.

In his evidence, the 1st defendant testified that he owned the suit land. He stated that he was allocated the suit land by the Settlement Fund Trustees (SFT) and produced the allotment letter and the SFT Charge as

exhibits. He testified that he obtained the land after exchanging a parcel of land that he had in Sosiani with the Government. He stated that he has been living on the land since the year 1967 to date. He testified that sometimes in the year 1978, he sold 300 bags of maize to one Wilson Wamburi Kingori at Kshs. 75/= per bag. Wilson did not collect the maize immediately but came back after one week. He did not collect the maize because he claimed that it is spoilt. The 1st defendant did not refund back the purchase price but later learnt that his land has been transferred to Wilson Wamburi. He claimed that this was done fraudulently. He then filed the suit Eldoret HCCC No.91 of 1978 against Wamburi claiming that Wamburi obtained registration of the land by fraud. The suit was heard and determined in favour of Wamburi. The 1st defendant alleged that Wamburi succeeded in the suit because, one Langat, gave false evidence of which he later confessed and was charged and convicted of perjury. The proceedings of the perjury case were produced as an exhibit. Wamburi later died in 1998 and the 1st defendant claimed to have resisted the burial of Wamburi on the land. He produced an interim order of injunction obtained in Kakamega PMCC No. 220 of 1998 which seems to have stopped the burial. In 2003, the 1st defendant filed a case before the Land Disputes Tribunal and the tribunal decided in his favour. The proceedings and order of the tribunal were produced as exhibits.

The 1st defendant called two other witnesses. The first of his witnesses gave an account of how the 1st defendant came to settle on the land. He testified that he obtained it from the Government, after he surrendered his land in Sosiani. The second witness testified that he was present when the 1st defendant settled on the land in the year 1967, and stated that the defendant still lives on the land.

In his submissions, counsel for the 1st defendant submitted that the 1st defendant has proved his claim, that he has been living on the land for a period of over 60 years, and asked that I allow the counterclaim.

I have considered the pleadings herein and the evidence on record. I have also looked keenly at the court record, which reveals additional facts touching on this case, which did not come out of the evidence adduced.

First, it must be appreciated that the claim of the 1st defendant is a claim solely based on adverse possession. Ordinarily, a claim of adverse possession is instituted by way of Originating Summons pursuant to the provisions of Order 37 of the Civil Procedure Rules, 2010, (formerly Order 36 of the previous rules. This counterclaim was instituted on 9 September 2004 and therefore the provisions of the former Order 36 prevailed. Order 36 Rule 7 provided as follows :-

(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.

The 1st defendant's claim of adverse possession was not instituted by way of Originating Summons but by way of counterclaim. Strictly, this is not permitted. However, practice has evolved where a counterclaim based on adverse possession is admitted, so as to avoid a multiplicity of suits. That does not however mean that the defendant raising such counterclaim is precluded from supporting such counterclaim with an affidavit to which he needs to annex a certified extract of the title to the land in question. This was not done in this case. Indeed, the 1st defendant has neither attached the extract of the title to the land parcel Kakamega/Sergoit/44 to his pleadings, and neither did he produce any in evidence. Even if I was to hold that the failure to file a supporting affidavit and the extract of the title to the pleadings were mere procedural technicalities, there is no way the 1st defendant can assert to have proved his case without producing the extract of the title, or at least some documentary evidence, indicating the person who is the registered owner of the suit land and against whom the claim for adverse possession is targeted. None has been produced in this case, and it is impossible for me to tell who the registered owner of the suit land is, and against whom the claim for adverse possession is aimed at. For that reason alone, this suit must fail.

If I am wrong on this point, I am still not convinced that the 1st defendant can succeed on the merits of his case. I can see that there was previous litigation, touching on the suit land, between the 1st defendant and Wamburi. This was Eldoret HCCC No. 91 of 1978. I have read the judgment of the said case which is on record in one of the affidavits in support of interlocutory orders that had earlier been sought. In that case, the 1st defendant sued Wamburi, claiming that Wamburi obtained the registration of the suit land fraudulently. The same evidence that was adduced by the 1st defendant in those proceedings is the same evidence adduced here. The 1st defendant (as plaintiff) had claimed that he sold maize to Wamburi but later Wamburi somehow got to be registered as the owner of the suit land. Simpson J, who heard the dispute was not impressed by the claims of the 1st defendant (as plaintiff) and dismissed the suit. It would appear that Wamburi took possession of the land, because he was indeed buried on the suit land in 1998, despite the efforts of the 1st defendant in trying to stop the burial. The decree in Eldoret HCCC No. 91 of 1978 has never been set aside despite a conviction of perjury of one of the witnesses called by Mr. Wamburi. The decree still subsists. The facts touching on how Wamburi acquired the land have already been litigated and are *res judicata*. I am not going to revisit the same. The High Court has already made a decision that Wamburi obtained title above board.

The 1st defendant does not seem to have been satisfied by this decree and has on two occasions filed proceedings before the Lukuyani Division Land Disputes Tribunal. The first was filed in the year 2002 as LKL Case No. 3 of 2002 . In its decision made on 4th June 2003, the tribunal held that it had no jurisdiction since the matter had been decided by the High Court. They however advised the 1st defendant (as claimant) to apply for review. Interestingly, in the subsequent proceedings filed in 2005 as LKL Case No. 9 of 2005, the Tribunal heard the matter, and decided that it had jurisdiction to review the judgement of the High Court and it purportedly proceeded to do so and award the 1st defendant the suit land. That decision seems to have been adopted as an order of the court vide Kakamega Misc. Award No. 20 of 2006. That award and the order of adoption have absolutely no validity in law as the land disputes tribunal and the Kakamega Magistrate's Court, being courts subordinate to the High Court cannot review a decision of the High Court or sit on appeal against a decision of the High Court. For the record, the proceedings in LKL Case No. 9 of 2005 and the proceedings in Kakamega Misc. Award No. 20 of 2006, are hereby declared null and void and ought not to be acted upon by any authority.

I am also not persuaded that the defendant never filed the suit Eldoret CMCC No. 371 of 2004 although he denied it in his defence. I have seen the ex-parte order issued in the said suit and I believe that it is on the basis of that order that the 1st defendant moved into possession, which is the year 2004. Twelve years had certainly not lapsed before this counterclaim was filed.

A person is entitled to claim by way of adverse possession where his occupation of the land has been *nec vi, nec clam, nec precario*, that is, without force without secrecy and without permission, for a period of at least 12 years. There must be quiet, uninterrupted possession of the land for at least 12 years, with the requisite intention to possess and eventually own the land. The 1st defendant could not have been on the land for 12 years before 2004 when he filed the counterclaim. The evidence shows that Wamburi was in possession till 1998 when he died. The litany of litigation from the Land Disputes Tribunal and the subordinate court proceedings also demonstrate that the possession of the 1st defendant, if any, has not been peaceful.

Even though the plaintiffs did not call any evidence to challenge that of the 1st defendant, the claim of the 1st defendant is wholly unmerited and must fail.

I therefore make the following final orders.

1. The plaintiff's suit against the defendants is hereby dismissed for want of prosecution.
2. The 1st defendant's counterclaim is hereby dismissed with costs.
3. For the avoidance of any doubt the proceedings in Lukuyani Land Disputes Tribunal Case No. 9 of 2005 and the Decree in Kakamega Chief Magistrate's Court Misc. Award No. 20 of 2006 which purported to review a valid judgment of the High Court are declared null and void and no entity ought to enforce or

give regard to those orders.

4. This Judgement and/or decree be served upon the relevant land registry.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.K. Ruto present for the 1st defendant (Plaintiff in counterclaim).