



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 47 OF 2015**

**BETWEEN**

**DAVID MUTURI MIGWI.....APPELLANT**

**AND**

**SALLY JEMELI KORIR.....1<sup>ST</sup> RESPONDENT**

**JUDITH C. KORIR.....2<sup>ND</sup> RESPONDENT**

**(Appeal from the Judgment of the Environment & Land Court at Eldoret (Munyao, J.) dated 30<sup>th</sup> day of January, 2015 in Eldoret Elc No. 232 Of 2012) Previously Eldoret Hccc N. 14 Of 2006 (OS)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] This is an appeal from the judgment and decree of the Environment and Land Court (ELC) (*Sila Munyao, J.*) dismissing the appellant's suit for a claim of four acres from land parcel Uasin Gishu Illula Settlement Scheme 1567/90 by adverse possession.

[2] By an originating summons (OS) dated 6<sup>th</sup> February, 2006 and brought under **section 38** of the **Limitation of Actions Act** and order XXXVI **Rule 7 of Civil Procedure Rules** (*now order 38 rule 7 of Civil Procedure Rules, 2010*), the appellant asked the High Court to determine issues, *inter alia*, whether he was entitled to four acres in land parcel Uasin Gishu Illula Settlement Scheme 1567/90 by adverse possession. The originating summons was supported by a verifying affidavit of the appellant which merely stated that the averments in the originating summons were true.

The suit was registered as High Court Eldoret Case No. 14 of 2006 (O.S.) but it was later transferred to ELC and re-registered as ELC Land Case No. 232 of 2012.

[3] The suit was ultimately heard by viva vice evidence. The appellant gave evidence and called two witnesses, Lucy Wangui Muturi and Nebert Afude Munagwe. The two respondents also gave evidence and called two witnesses, namely, Esther Jemutai Kiprono and Edwin Kaprob Korir.

[4] The appellant's case was briefly as follows:

By an agreement of sale dated 2<sup>nd</sup> October, 1986, Yusuf Korir Chepkeitany, who was a Chief sold to him four acres of his ten acre parcel of land known as Plot 90 Illula Settlement Scheme for a consideration of Kshs.48,000/= which he paid to the vendor. The vendor then took him to the land and informed the caretaker, one Manduku that he had sold 4 acres. Later, the 4 acres were measured on the ground and the appellant took possession.

In 1987, the appellant fenced the land. The land was in a settlement scheme and there was an outstanding loan of Kshs.44,000/=. On 19<sup>th</sup> January, 2004, the appellant paid Kshs.22,828/= being part of the outstanding loan at the District Settlement Office.

The vendor started cultivating the land and in 1990, he constructed a house and moved his family to the land.

On 11<sup>th</sup> March, 2005, the vendor died. There were tribal skirmishes in 2008 and his house was burnt and he moved out of the land. The 1<sup>st</sup>

respondent and the 2<sup>nd</sup> respondent who are the wife and daughter of the deceased respectively started cultivating the land.

In 2009, the appellant returned to the land and found the deceased's daughter using the land.

[5] The essence of respondents' case was that the deceased did not enter into an agreement of sale with the appellant and the purported signature of the deceased on the agreement is a forgery; that the appellant only claimed to have bought the land after the death of the vendor; that the deceased only allowed the father of the appellant, and the appellant, who had land in the neighbourhood, to use the land; that the deceased told the appellant to pay part of the loan because he was using the land and that the deceased did not have title to the land.

[6] The learned judge dismissed the claim on two grounds namely, firstly, that the originating summons was not supported by an affidavit and secondly, that an extract of the title of the land claimed by the appellant was not annexed.

The learned judge reasoned, thus:

**“The purpose of this requirement (of annexing an extract of title), in my view is to make clear, which land the plaintiff claims adverse possession to. It is also to make clear the person against whom the plaintiff is asserting the adverse title. The nature of an adverse possession suit is that a person is claiming title which is registered in the name of another. It is therefore necessary to be explicit on the title being claimed and to show clearly who the owner of the said title is.**

**The extract of title also shows the history of proprietorship of the land claimed. This history is important in computing time, for there are some entities against whom one cannot claim adverse possession. So long as they remain the registered owners of the title being claimed, title cannot start running in favour of the occupant of the land in question. These entities are set out in section 41 of the Limitation of Actions Act ...”**

[7] In the first two grounds of appeal, the appellant states that the judge erred:

(i) in law and in fact in failing to appreciate that title to land is not synonymous with registration and issuance of a title deed but it is the right to own and possess the property comprised in the title.

(ii) in finding that no ownership of title was proved while L.R. Uasin Gishu/Illula Settlement Scheme/567/90 existed and still exists.

At the hearing of the appeal, Mr. Kiarie held brief for Mr. Ngige, counsel on record for the appellant and relied on the written submissions filed on 21<sup>st</sup> June, 2017. Ms Kipseii, learned counsel for the respondents did not file written submissions although earlier given an adjournment to allow her to file them. Ms Kiplangat who held brief for counsel for the respondents made brief oral submissions. However, the respondents' written submissions filed at the trial are contained in the record of appeal.

[8] The appellant's written submissions do not adequately deal with the issues raised in the first two grounds of appeal. The appellant's contention both here and in the court below is that the failure to annex an extract of title is a procedural technicality which should be disregarded by virtue of Article 159(2) (d) of the Constitution.

On the other hand, the respondents contend that a claim for adverse possession runs against a title, that no title had been issued to the deceased or to the respondents and that the appellant should have directed his claim against the Settlement Fund Trustees.

[9] By section 7 of the Limitation of Actions Act, the limitation period to recover land is 12 years and by section 17 of the same Act, at the expiry of the limitation period the title of the person to the land is extinguished. However, by section 13(1) thereof, *“a right to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession)”*. Section 38(1) of the Act provides:

**“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 these 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”.**

[10] The Acts referred to in section 37 are the Government Lands Act, Registration of Titles Act, the Land Titles Act and the Registered Land Act.

All those Acts have now been repealed by the Land Registration Act, 2012.

Section 41 of the Act provides that the Act does not enable a person to acquire any title to, *inter alia*, **“Government Land or land otherwise enjoyed by the Government”**.

[11] The land under the jurisdiction of the Settlement Fund Trustees (SFT) is Government land: We take judicial notice of the fact that invariably after the allottee has completed the payment of the purchase price and other charges the Government of Kenya, is registered as the first registered proprietor and subsequently the allottee is registered as the second registered proprietor. (*See Jane Jeptoo Sawe v Estate of Sylvester Kimagut Sang – Eldoret Civil Appeal No. 105 of 2015*)

[12] The appellant admitted in his evidence at the trial that at the time he bought the land the deceased had no title and still did not have the title at the time of his death. He explained that the deceased did not have the title because the land was still under the Settlement Fund

Trustees because of the outstanding loan. It was also clear from the evidence that the SFT had not transferred the land to the respondents at the time of the trial. Although SFT had allocated the land to the deceased, the process of acquisition of title by the deceased had not been completed and the deceased had not become the proprietor of the land in law. Had the process been completed, SFT would have transferred the land to the deceased, the Government registered as first proprietor and the deceased would have been registered as second proprietor under the Registered Land Act.

The acquisition of land by adverse possession is by operation of the law and section 38 of the Limitation of Actions Act expressly provides that the land claimed by adverse possession must have been registered under any of the Acts specified in section 37 and further that, the order to be sought in the High Court is for registration of the person claiming land by adverse possession *in place of the person then registered* (emphasis added).

In **Francis Gitonga Macharia v Muiruri Waithaka [1998] eKLR**, this Court held, in essence, that a claim based on adverse possession before the person against whom the claim is brought is registered as the proprietor of the land was premature and incompetent. It follows that since the deceased was not registered as a proprietor of the land under any of the specified Acts, there was no title which could have been extinguished by virtue of **section 17** of the **Limitation of Actions Act** to give rise to a claim for adverse possession.

[13] It is a procedural requirement under Order 37(7)(2) of the Civil Procedure Rules that an application under section 38 of the Limitation of Actions Act should be made by originating summons supported by an affidavit to which a certified extract of the title to land in question has been annexed.

The originating summons was heard by viva voce evidence. We would agree with the appellant's submission that failure to annex a certified extract of title to the affidavit is a procedural irregularity which could be cured by providing the extract of title at any stage of the proceedings. We also agree that in the circumstances of this case, failure to file a comprehensive affidavit to support the claim to land by adverse possession was not fatal to the claim since oral evidence was tendered at the trial to support the claim. However, this is not a case where the appellant merely failed to produce a certified abstract of title. Rather, this is a case where the deceased did not have a registered title to the land and none existed at the time of the trial. By **Section 41** of the Act, Government land cannot be acquired by adverse possession.

[14] For the foregoing reasons, we hold that since the deceased did not have title to the land and the land was vested in SFT, a Government body, at the time the originating summons was lodged, the contingent interest in land by the deceased could not have been extinguished by operation of law and the claim to land by adverse possession was not maintainable in law.

[15] The rest of the grounds of appeal relate to the merits of the claim for adverse possession. The court did not determine the merits of the claim.

In view of the finding at paragraph 14 above, we do not find it necessary to delve into the merits of the claim.

[16] For the foregoing reasons, the appeal is dismissed with costs to the respondents.

**DATED and delivered at Eldoret this 17<sup>th</sup> day of May, 2018.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**