IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL136 OF 2005

BETWEEN

NDIEMA SAMBURI SOTI ……..…….. APPELLANT

AND

ELVIS KIMTAI CHEPKESES …….. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Bungoma (Sergon, J.) dated 17th March, 2005

in

H.C.C.C. NO. 137 OF 2000)
****

JUDGMENT OF THE COURT

This is an appeal against the judgment of the superior court at Bungoma (Sergon J.) dated 17th March, 2005 dismissing the appellant's claim to a portion of nine (9) acres of land by adverse possession.

By an originating summons dated 20th September, 2000, the appellant sought a declaration that he had acquired a portion of nine (9) acres of land from Title No. Elgon/Namorio/504 by adverse possession and a further relief that he be registered as an absolute owner of the land.

The originating summons was supported by the appellant's affidavit deposing, among other things, that on 4th May, 1964 he bought 7 acres of land parcel No. Elgon/Namoria/504 from **Chepkesis K. Kiboroywo** (deceased) at a consideration of Shs.2,050/= which he fully paid on 11th March, 1969; that on 28th July, 1968 he bought a further 2 acres from the deceased which he fully paid on 4th August, 1968; that the seller died in 1981 before he could sign the relevant documents to effect the transfer; that in 1981 he went to the Land Control Board in the company of **Elvis Kimtai Chepkesis** (respondent herein) and consent for sub-division and transfer was given; that the land was subsequently surveyed and found to be 9 acres and mutation prepared; that he has been in peaceful possession of the suit land exercising the rights of an owner since 1964 and, lastly, that he has done a lot of development on the land. In his evidence in support of the suit, the appellant testified, among other things, that the land he bought from the deceased on 4th May, 1964 measured 125 yards X 144 yards; that he bought another portion from **Eko chepkeses** on 28th July, 1968 as part of the seller's share of the deceased's land; and that he attended Kimilili Land Control Board in the company of the deceased. On cross-examination the appellant testified that the deceased was illiterate; that the deceased did not sign the 1964 agreement; that the1964 agreement has been altered by erasing the purchase price of Shs.1,500/= and replacing it with Shs.2,050/= and further by insertion of plot No. 504; and that he did not cause himself to be registered as proprietor of the suit land when registration of land in the area started in 1969. The appellant's first witness **William Odikoro Ewoli** (PW2) testified that appellant bought a piece of land measuring 2 X 101½ yards from **Eko Chepkesis** a son of the deceased, for Shs.1,750/=. The appellant's 2nd witness **Richard Chebuyo Simati** (PW3) who was an Assistant Chief of the area from 1977 to 1996 did not give evidence relating to the sale of the two portions of land but stated that the land in dispute was surveyed in 1981 and found to be 9 acres. The appellant's third witness **Isaac Chepmwoti Chesiro** (PW4) testified that he witnessed the purchase of the two portions of land by the appellant and added that the appellant and his second wife occupied the land. Similarly, **Benson Osuru Echikoi** (PW5) testified in part that the appellant bought a portion of land measuring 125 X 144 yards from the deceased on 4th May, 1964 and another portion measuring 8 X 101.5 yards from **Eko Chepkeses** a son of the deceased in 1968 and that Eko chepkeses is now deceased.

Lastly, **Thomas Oruoch Nyagando** (PW6 – erroneously shown as PW5), a surveyor attached to Mt. Elgon District Land Office gave evidence relating to the records of the deceased's land and the aborted registration of mutation of the deceased's land.

On his part, the respondent deposed in the replying affidavit, inter alia, that the deceased did not sell two pieces of land to the appellant as alleged; that the deceased only leased two acres at a rent of 2 bags of maize per year in the years 1975 – 1978 when the deceased had moved to Chepkitale forest; that the appellant failed to vacate the land after the deceased demanded it upon return; that the appellant has never been in peaceful possession of the land claimed; that the respondent did not accompany the appellant to the Land Control Board as alleged; that the mutation forms are false, and lastly, that the originating summons is based on falsehood. The respondent testified in part, that his father died in 1981; that he obtained a grant of letters of administration on 3rd April, 2000; that the deceased did not sell the land to the appellant; that there is nobody named Eko in his family; that the Land Control Board could not have given consent for sub-division and transfer without his father's approval; that the appellant has never lived on the deceased's land; and that the appellant only cultivated the land for about 3 years between 1975 and 1978 and that the appellant has his own land Title No. Elgon/Namorio/438. He called one witness – **Joyce Cheptarus** (DW2) his mother, who testified, among other things, that the appellant was only given 2 acres to cultivate.

The superior court evaluated the evidence and concluded::

"To finalize this matter, I find that the plaintiff has failed to establish that he had a valid sale agreement between himself and the late Chepkeses Chebasis Kiboroywo. The latter did not append his signature to the two agreements allegedly entered on 4th May and 28th July 1968.

The plaintiff also failed to explain the origin of the alterations inserted on the agreement of 4th May 1964. The plaintiff further failed to establish that he had a peaceful continuous and uninterrupted occupation of L.R. NO. ELGON/NAMORIO/504. The date of occupation is not certain and no clear evidence established that the plaintiff ever resided on the land in dispute. The evidence adduced does not prove that the plaintiff occupied 9 acres as claimed in the originating summons. The plaintiff appeared before the Land Control Board claiming to be given 2 acres. The question is: why now claim 9 acres after the death of Chepkeses Chebasis Kiboroywo? The plaintiff and his witnesses did not impress me as people who would tell the truth. They lied to court.

I am convinced that the defendant Elvis Kimtai Chepkeses and his mother Joyce Cheptarus told the truth. I believe their evidence to the effect that the plaintiff was a mere licensee given permission by the deceased, Chepkeses Chebasis Kiboroywo to plough and cultivate 2 acres of L.R. NO. ELGON.NAMORIO/504. There is no evidence as to when the plaintiff's licence was terminated. The Plaintiff did not establish his claim on a balance of probabilities".

Mr. Ocharo Kebira, the learned counsel for the appellant relied on three grounds of appeal, namely, that the trial judge erred in law and fact in finding that the appellant did not prove the claim of adverse possession; that the trial judge erred in law and fact when he dismissed the appellants suit on insufficient and unmerited grounds, and, lastly, that the entire judgment was against the weight of the evidence. He maintained in his submissions that the appellant had proved that he had exclusive possession of suit land pursuant to a valid agreement.

Mr. Khakula, learned counsel for the respondent on the other hand submitted, inter alia, that continuous peaceful possession was not proved and that the appellant instead attempted to prove purchase of land.

The deceased's land parcel No. Elgon/Namorio/504 from which the appellant claims 9 acres comprises of 12.1 Hectares (about 30 acres) and was registered under the *Registered Land Act* (RLA) on 1st April, 1969. The appellant has also proved by production of a copy of the register (green card) that the appellant is the registered proprietor of parcel No. Elgon/Namario/438 comprising of 56 acres which was also registered under the Registered Land Act on the same day – that is on 1st April, 1996. This fact was not denied by the appellant. It was submitted by Mr. Khakula at the trial in the superior court that the registration was preceded by the application of Land Consolidation Act and Land Adjudication Act to the area under *Legal Notices Nos. 518 of 1961* and *L.N. 130 of 1970* respectively. Broadly, the two Acts provide the mechanism for the ascertainment and adjudication of rights to land held under customary tenure. It is after the machinery provided in the two Acts particularly in the Land Adjudication Act is exhausted that the person adjudicated as the proprietor is registered as such under RLA.

By **Sections 27 (a)** and **28** of RLA the registration of the deceased as proprietor of the land vested in him absolute ownership which is not liable to be defeated except as provided by RLA. However, by **Section 30**, the deceased's land is subject to overriding interests which include as stated in **Section 30 (f)**:

"rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription".

Thus, the appellant's claim to the land by adverse possession which is based on **Sections 37** and **38** of the Limitations of Actions Act was properly brought. It is another matter whether the claim was proved.

It is true as contended by Mr. Khakula, that the appellant by his supporting affidavit and by the evidence in essence intended to prove that he purchased the land. The evidence relating to the purchase of the land is however irrelevant because the claim to the suit land through purchase was defeated by the registration of the deceased under RLA as proprietor of the entire land. Such a claim should have been raised at the time of land adjudication and considered by the relevant adjudication committee. The evidence of purchase is nevertheless relevant as it explains how, if at all, the appellant came into possession of the land and for that reason it relates to issue whether the appellant proved claim to land by adverse possession.

The issue whether or not the appellant was in adverse possession of the suit land is a matter of evidence. Although the first appellate court is not bound by the findings of fact made by a trial court and is under a duty to re-appraise the evidence and reach its own conclusion, the first appellate court, nevertheless, should be slow to interfere with the findings of fact by the trial judge. The first appellate court will however interfere when the findings of fact are based on no evidence or on a misapprehension of evidence or where it is shown that a trial judge has acted on wrong principles in arriving at the finding in issue (**Mwanasokoni vs. Kenya Bus Services Ltd.** – [1985] KLR 931. Moreover where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of witnesses (**Hahn vs. Singh** [1985] KLR 716.

It is correct as submitted by Mr. Khakula that the judge found the quality of the evidence of the appellant and his witnesses to be poor.

The appellant in his supporting affidavit claimed that he bought 9 acres from the deceased and that he had been in continuous possession of the 9 acres throughout. In contrast, the appellant testified that he bought a portion measuring 125 yards X 144 yards from the deceased in 1964 and another portion from one Eko Chepkeses in 1968. The evidence shows that the portion that the appellant allegedly bought from Eko measured 8 X 101½ yards. The two portions hardly measure 9 acres. The application for Land Control Board consent dated 2nd April, 1981 produced by appellant indicates that the deceased intended to transfer 2 acres to the appellant which conforms with the evidence of the respondent that the appellant was put in possession of two acres only. It is clear that there was no conclusive evidence that the appellant was in possession of a portion of 9 acres of the deceased's land.

Furthermore, there was no concrete evidence that the appellant was in *adverse* possession of the land or when his possession became adverse. On the contrary, if the evidence of the appellant and his witness is to be believed, it means that the appellant was put in possession of the land as a purchaser pending completion of the sale. The evidence of the appellant and the documents he produced as exhibits further show that the appellant throughout the whole period until the deceased passed away in 1981 believed that he was a purchaser of the land. Even after the demise of the proprietor the appellant attempted to register mutation documents. All this indicate that the appellant was in possession of the land with the consent of the deceased. A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal, (**Wanje vs. Saikwa (No.2)** [1984] KLR 284).

Moreover, even if it is accepted that the appellant took possession of the land as a purchaser, his possession can only become adverse once the contract is repudiated, (**Wambugu vs. Njuguna** [1983] KLR 172.

In this case, the appellant did not say that the sale was ever repudiated. Indeed, he persistently claimed to be a purchaser and even attempted to get registered as such after the demise of the proprietor.

Lastly, the trial judge made a finding that the appellant and his witnesses were not truthful and that they lied to the court. Apart from the inconsistency in the appellant's case regarding the size of the land he allegedly bought, the appellant admitted that the 1964 agreement was altered. There was also a finding of fact by the trial judge that the appellant and **Richard Chebuywo Simati** (PW3) signed mutation forms when they knew that the proprietor was deceased and that it is the Lands office which discovered that the proprietor was deceased and rejected the documents.

In these circumstances, the trial judge quite properly, in our view, rejected the evidence of the appellant and his witnesses.

From the foregoing, we find, like the trial judge, that the appellant did not prove his case on balance of probabilities.

In the result, the appeal is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 12th day of November, 2010.
S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

…….
JUDGE OF APPEAL

P. N. WAKI

……..…..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR