



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 20 OF 1991

KURUI & 2 OTHERS.....PLAINTIFFS

VERSUS

CHEROP.....RESPONDENT

JUDGMENT

The plaintiffs in this case filed a case on the 16th August 1990 seeking eviction against the defendant. They allege they are the legal heirs to the said parcel of land Elgeyo Border SFT plot No 281 which they inherited from their late father to which they have already been issued with a title deed.

That the defendant moved and started cultivating the said plot when their father was sick.

They prayed for eviction of the defendant from the suit land, costs of the suit and any other relief that the Court may deem fit to grant.

The defendant filed a defence on 17th October, 1990 in which he averred that he bought plot 281 Elgeyo Border SFT in the year 1963 from the late Chepkurui Chebosony the father of the plaintiffs and he has been in occupation since 1963 and he has acquired adverse possession on it and he is the rightful owner of the suit land. He prayed for a declaration that he is entitled to the suit land by adverse possession and that the name of the deceased should be removed and substituted with his own.

He prayed for costs and such other relief as the Court may deem fit to grant.

The case is very brief that the father was allocated the said plot. He fell sick and he went to reside in on the said plot illegally. Exhibit 5, others exhibit 6, 7 and 8 which relates to the processing of letters of administration and 9, 10 relating to revenue.

The evidence of the sons PW1, 2 and 3 was confirmed by that of missing from original.

When cross-examined they stated they looked for the defendant and told him but he refused to appear before the elders to decide on the land issue. He denied any knowledge of an agreement of sale between the defendant and his deceased father. That the father died in 1976 and they took time where he died in 1976.

The mother PW4 as well as the deceased told the plaintiffs who were then children that there was land at Elgeyo border.

They grew up and started making enquiries and came to discover that it is the land which was being cultivated by the defendant.

They checked with settlement office and found that the loan had not been paid and so they paid off the loan and were issued with a title deed-exhibit 1. The receipts were produced as exhibit 29(b), transfer receipt exhibit 4. They produced a letter from the settlement office to show that the defendant was living to complain as they were growing up.

They denied following up the land case just because the title deed came out in their father's name.

The mother PW4, was firm that she was not aware that the land had been sold as the deceased would have informed her. She said they took time because they were tracing the number and did not want people to know that they were following it.

The defendant testified that on 4th January 1963 *shambas* were being allocated to those who had been selected from various districts by Settlement Fund Trustees. He was present but he was not allocated any land. Plot 281 was a forest. The owner rejected it and gave it to one Zakaria Oloibe. Zakaria did not want it and so he sold it to the defendant and he was refunded the money. He was given the farm exhibit D1. The plot had loans, which he had to pay. He was later taken to the settlement office. He told the deceased that they go to the Land Control Board for transfer. He applied and he was issued with the exhibit D2.

Since he hadn't paid the loans fully, the land was to remain the property of the Settlement Fund Trustees.

He applied for land to District Commissioner Uasin Gishu and he was told to apply to the District Commissioner Elgeyo Marakwet.

He added that in 1969 they went to the Chief who referred the matter to the District Officer, exhibit 6. The DO advised the parties to bring the matter to Court.

He said he was paying the loan frequently through the Co-operative and he paid all loans as per the demand notices.

He seeks a declaration that plot No 281 is his and it should be transferred to him as he is entitled to it by adverse possession. He has done a lot of developments on the land.

When cross-examined he conceded that he did not go to the deceased to transfer the land for him. He added that he went to the *shamba* with the deceased. He added that the land could not be changed into his name as it was still Government land. That there would be no transfer until the land is transferred into his name.

He added that he did not see the wife.

DW2 is the Area Settlement Officer Uasin Gishu. He told me. He checked the record. He found that the first notice was on 14th September 1965 which was pinned on a fence as there was no house on the *shamba* and the person who witnessed the pinning was the defendant.

In 1989 the outstanding loan of Kshs 20,500/- was paid. From the records the owner died and his children succeeded him.

When cross-examined he clarified that the transfer can be effected even if the whole loan is not fully paid but you cannot sell a portion of it. The buyer will inherit the loan balance.

DW3 testified that the deceased was allocated plot No 281 but he didn't like he gave it to him and he, DW3, refunded him what he had paid. The deceased then gave him exhibit DW1. Later on between the month of January and February 1963 he handed them to Cherop who refunded him Shs120/-. There was no formal agreement as they trusted each other.

When cross-examined he stated that he stayed in the *shamba* for a few months. He added that they were just the two of them him and the deceased when they discussed about the *shamba*. There was nobody else around except him and the deceased. There was no witness.

Between 1963-1989 he never met the deceased. He was firm there was no time they came to look for the deceased to effect the transfer for them.

He added that the defendant has never come to him requesting him to go and effect the transfer to him.

He was firm the defendant does not know the deceased.

The plaintiffs submitted as follows:

1. Their father never sold plot 281 as there is no proof.
2. The transaction never went through the Land Control Board.
3. There was no contractual relationship between the defendant and the deceased as the defendant said that the land was given to him by DW3.
4. The defendant took no steps to have the name of the deceased removed from the title.
5. The defendant has only been cultivating the land.
6. The defendant produced no receipt to show that he had paid for the land loan except only Shs 389/-
7. The letter from the settlement office dated 1971 described the defendant as staying on plot No 281 illegally.

The defendant on the other hand put in written submissions:

1. That the land was given out to DW3 who sold it out to the defendant.
2. The defendant took actual possession of the said plot in September 1963 and he started developments thereon.
3. That the defendant made attempts to have the land transferred into his name but he was unsuccessful.
4. That he used to repay the loan through proceeds from the sale of milk.
5. That plaintiffs took over 12 years to institute succession proceedings and the only inference that can

be drawn is that this is an after thought aimed at depriving the defendant of his land.

6. The defendant has been in uninterrupted occupation of the suit land for over a period of 12 years which amounts to an overriding interest.

7. The defendant has also acquired title over the said land through adverse possession.

8. That the deceased and DW3 had dispossessed themselves of the said land.

Having assessed the evidence adduced by both parties and having perused the written submissions of both parties it is clear that the suit land is a settlement plot allocated in 1963. The stand of the plaintiffs is that the deceased never sold the land.

The defendant on the other hand in his defence says he bought the land from the deceased in 1963. However, in his testimony he changed the story and said that he bought it from DW3 Oloibe on the same day he, Oloibe bought it from the deceased.

The evidence of DW3 is totally different. He says he was alone when he took the land from the deceased and after 2 months or so is when he gave it to the defendant. According to DW3 the defendant and the deceased never met at all.

The evidence on the record further shows that the defendant has been cultivating the said land from 1963 up to the present day.

The question to be asked now is in what capacity has he been occupying this land. He has stated he was a purchaser. The plaintiffs have disputed this. There is no written document between them. In any case he, defendant, acquired title from DW3 and as the defence put it there was no privity of contract between the deceased and the defendant.

The next point is the case of the Land Control Board. The defendant did not submit himself to the Land Control Board. Exhibit D2 indicates that the defendant would be informed if he has been selected as the purchaser.

Exhibit D3 referred him to DC Elgeyo Marakwet. Exhibit D2 and 3 do not specify the portion of land being relied upon.

From the above it is clear that there was no Land Control Board consent. This was confirmed by DW3 and the defendant himself.

If the defendant had been sold this plot or had acquired it as his own, we look for positive action tending to show that the plot was his.

We were told he has developed it. This has been confirmed by the plaintiffs except a demand that he has his house on the plot. The plaintiffs submitted that if the defendant had bought the plot he could have been paying the loan. The demand notices are in the files and the details are as hereunder:

1. Dated 31st December 1969 - total owing Shs 3,996/-. There is no loan repayment.

2. Dated 30th June 1970 - loan repayment by Shs 300/- leaving a balance of Shs 3,159/-

3. 31st December 1970 - No loan repayment and the balance is KShs 3,532/-.
4. 30th June 1971 - No repayment - outstanding is KShs 3,920/00.
5. 31st December 1971 - loan repayment of KShs 389/- and the balance is KShs 3,919/-.
6. 30th June 1975 - No repayment and the balance is KShs 6,529/-.
7. 31st December 1975 - No loan repayment and amount due is KShs 6,876/-.
8. 30th June 1976 - No loan repayment and the total due is KShs 7,228/-
9. 31st December 1976 - No loan repayment. Amount due is KShs 7,597/-.
10. 30th June 1977 - No repayment, amount due is KShs 7,978/-.
11. 31st December 1977 - No repayment. Balance KShs 8,371/-.
12. 30th June 1978 - No repayment, balance is KShs 8,777/-.
13. 31st December 1978 - No repayment, balance is KShs 9,196/-.
14. 30th June 1979 - loan repayment of Shs 140/-, balance is KShs 9,484/-.
15. 31st December 1979 - No repayment, balance is KShs 9,926/-.
16. 30th June 1980 - No repayment and balance is KShs 10,383/-.
17. 31st December 1980 - No repayment and the balance is KShs 10,854/-.
18. 30th June 1981 - No repayment, balance is KShs 11,341/-.
19. 31st December 1981 - No repayment, balance is KShs 11,844/-.
20. 30th June 1982 - No repayment and the balance is KShs 12,363/-.
21. 31st December 1982 - No repayment and the balance is KShs 12,899/-.
22. 30th June 1983 - No repayment and the balance is KShs 13,452/-.
23. 31st December 1983 - No loan repayment and the balance is KShs 14,023/-.
24. 30th June 1984 - No repayment, balance is KShs 14,613/-.
25. 31st December 1984 - No repayment and the balance is KShs 15,222/-
26. 30th June 1985 - No repayment and the balance is KShs 15,851/-.
27. 31st December 1985 - No repayment and the balance is Kshs 16,500/-.

28. 30th June 1986 - No repayment and the balance is KShs 17,170/-.

29. 31st December 1986 - No repayment, balance is KShs 17,862/-.

30. 31st December 1987 - No repayment, balance is KShs 19,315/-.

31. 30th June 1987 - No repayment, balance is KShs 18,577/-.

32. 30th June 1988 - No repayment, balance is KShs 20,071/-.

33. 31st December 1988 - No repayment and the balance is KShs 30,864/-.

There is repayment by the plaintiffs of Kshs 17, 365/- and Shs 3, 500/- clearing the whole amount.

From the above record it shows that the defendant only paid Kshs 820/-

The question is this conduct of a person who believes the land to be his"

The answer is no because if he had truly bought the land he could have paid for the loans. The defendant's allegation that he paid through milk deposits holds no water as he had no record to show that indeed there were such repayments through the co-operatives.

The plaintiffs have paid all the loan due. We now have to look for evidence which tends to show that the defendant, recognized the title of the deceased or his family over the suit land. The first one is loan repayment.

As stated earlier if the defendant had known that the land was his he could have paid for the land loans.

The second one is failure to effect transfer into his name. He alleged that he was waiting for the whole loan to be paid fully before he asks for transfer. He, the defendant, said that was the procedure but he was proved wrong by the Settlement Officer DW2 who stated that where two parties are willing to transfer the whole land, transfer will be effected and the purchaser will inherit the loan balance. We have a letter exhibit 5 from the Area Settlement Officer to the effect that the defendant was occupying plot 281 illegally.

This now brings me to the issue of adverse possession. As stated earlier the defendant cannot succeed on contract as there is no agreement and also there is no Land Control Board consent.

The rule in adverse possession is that the party must have been in possession for over 12 years.

The stand of the defendant is that he has been so. We now have to look at the period. He took the land in 1963. It was in the name of the deceased. The period of adverse possession was to run against the deceased. He died in 1976. From 1963 to 1976 is a total of 13 years. From the above it is clear that the defendant had 13 years in his favour. He should have sued the deceased to get the title. He did not do so. When the deceased died in 1976 that right was to run against the estate. He had 12 years during which to claim against the estate. 12 years ended in 1988. Now by this time the dispute between the parties had started and it therefore interrupted the period. In 1989 the land changed to the heirs and this distinguished the defendants claim over the estate of the deceased. It is a general rule that the period starts running afresh whenever there are changes in the title. I refer to the case of *Kimani Ruchine & another v Swift Rutherford & Co Ltd & another* [1980] KLR 10. It was held that where cultivation of the

land is advanced to support the claim to adverse possession the evidence of the cultivation must be definite as to the area and time.

I refer to the case of *Sospeter Wanyoike v Waithaka Kahiri* [1979] KLR 236. The defendant the registered owner of a parcel of land agreed in 1965 to sell it to the plaintiff who was in occupation at the time. Land Control Board consent to the transaction was not obtained and the sale was never formally completed. In 1974 the plaintiff filed a suit in a Resident Magistrate's Court claiming to have the land transferred to him. The magistrate found that the defendant was the registered owner of the land and that the Land Control Board had not given its consent to the transaction. He accordingly dismissed the suit. On 14th December 1977, the plaintiff instituted proceedings in the High Court for a declaration that he had become entitled to the parcel of land by adverse possession over twelve years.

It was held that as the payments of the purchase price by instalments after the date of the agreement recognized the defendant's title to the land the period of limitation for adverse possession did not begin to run until the last instalment was paid. The plaintiff's action for the declaration commenced on 14th December 1977 was premature. Furthermore the action filed in 1974 had interrupted the period of adverse possession.

As pointed out earlier in my judgment the period of adverse possession was interrupted in 1976 upon death of the deceased, 1988 when a dispute started over the same land. For the reasons given above the issue of adverse possession fails.

The net result is that the plaintiffs have proved their case on a balance of probability and I enter judgment for them. For it would be unfair to alter the position of the parties now in view of the fact that the plaintiffs have cleared the loan and have a title deed in their name. The defendant never took any positive action to show that the land was his other than using it. He was using it because it was next to his and because the owners were not around. Therefore by conduct of the defendant he all along recognized the deceased's title on the land by not paying the loan and secondly by not filing a case to claim the same through adverse possession.

I enter judgment for the plaintiffs on the following terms:

1. That the defendant herein be and is hereby ordered to be evicted from the suit land.
2. Costs of this suit with interest at court rates.
3. The defendants counter-claim on adverse possession be and is hereby dismissed with costs to the plaintiff.



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