



**Lagat v Kimaru (Environment & Land Case 182 of 2017)
[2023] KEELC 16324 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 182 OF 2017**

**EO OBAGA, J
MARCH 20, 2023**

BETWEEN

SAMMY KIRWOK LAGAT PLAINTIFF

AND

CHRISTOPHER KIMARU DEFENDANT

JUDGMENT

Background and Introduction

1. On February 8, 2017 the Plaintiff Christopher Kimaru Lagat filed a suit against the Defendant Sammy Kirwok in which he sought injunctive orders restraining the Defendant from trespassing on to LR No Moi's Bridge/Moi's Bridge Block 2 (Tuiyobei) 72 (suit property) in addition to costs of the suit. This suit was amended on April 25, 2017 wherein the Plaintiff introduced a third prayer for eviction of the Defendant from the suit property.
2. On April 26, 2017, the Defendant in the earlier suit filed an originating summons against the Plaintiff in which the Applicant sought to be declared as having acquired the suit property by way of adverse possession. On April 11, 2018, the Advocates for the parties herein recorded a consent in which they agreed that the originating summons was to be converted into a plaint and the replying affidavits thereto as defence. It was further agreed that the issues in the converted originating summons and the decision made thereon would apply in the earlier suit and that the hearing was to be by *viva voce* evidence.
3. The Defendant in the converted originating summons is the registered owner of the suit property. In the year 2000, the Defendant entered into two sale agreements in which he sold to the Defendant two points for Kshs 21,000/= each on January 26, 2000 and one point on February 21, 2000 respectively. The other agreement for sale of a half a point was made on September 24, 2004 making a total of three and half points.



4. Even after selling the third point to the Plaintiff on February 21, 2000, the Defendant had not granted possession to the Plaintiff. The Plaintiff forcefully took possession, built a house, brought in his cows, planted trees and fenced the purchased portion. After he took forceful possession in 2000, the Defendant added him one point in 2004.
5. There were disputes over the forceful possession of the plaintiff on the purchased three and half points. This prompted a meetings before the area chief where the elders present agreed that the Plaintiff was to add the Defendant Kshs 5,000/= for each point purchased making a total of Kshs 20,000/= in addition to sale of half a point at 12,500/=. This was on 15th March, 2006 and the Plaintiff was supposed to pay the amount within 21 days. The Plaintiff never paid the amount as agreed.
6. The Plaintiff and the Defendant continued to have frosty relationship. There were arbitral proceedings before the Chief as late as 2016 where the Chief and elders advised that whoever was dissatisfied was at liberty to move to court. This is what may have prompted the Defendant to move to court where he filed Eldoret ELC 42 of 2017 on February 8, 2017 which he later amended on April 25, 2017. It is this case which triggered the filing of Eldoret ELC Originating Summons No 182 of 2017 which was filed on April 26, 2017. The Originating summons has since been converted into a plaint and the replying affidavits as defence.

Plaintiff's Case

7. The Plaintiff testified that on January 26, 2000, he entered into a sale agreement whereby the Defendant agreed to sell to him 0.2 of an acre at Kshs 42,000/=. Again on February 21, 2000, the Defendant sold to him 0.1 of an acre. On September 24, 2004, the Defendant sold to him 0.1 of an acre making a total of 0.4 of an acre.
8. As at the time he purchased the 0.1 of an acre on February 25, 2000, the Defendant had not granted him possession. He decided to move in by force. The Plaintiff states that he has enjoyed quiet possession of the portion purchase until 2017 when the Defendant sued him seeking to evict him. It is after this that he filed Originating Summon No 182 of 2017 seeking to assert his prescriptive rights.
9. The Plaintiff called two other witnesses who are his neighbours who testified that they have seen the Plaintiff on the suit property since the year 2000; that the Plaintiff has built a house on it; planted trees and fenced the same.

Defendant's Case

10. The Defendant testified that he indeed sold 0.2 of an acre to the Defendant vide agreement dated January 26, 2000. On February 21, 2000, he sold another 0.1 of an acre. on September 24, 2004, he sold half a point making a total of three and half points.
11. The Defendant went on to testify that the Plaintiff does not reside on the 0.4 of an acre which he sold to him and that the Plaintiff's house is on land he purchased from John Melly to whom the Defendant had sold two acres. He stated that the 0.4 of an acre is utilized as grazing ground by him and the Plaintiff.
12. The Defendant testified that on March 15, 2006, he and the Plaintiff appeared before the Chief where it was agreed that he pays an additional of Kshs 5,000/= for every point purchased making a total of Kshs 20,000/=. Despite the Plaintiff agreeing to pay the amount within 21 days, he has never paid and that his stay on the 0.4 acres has not been peaceful as the Plaintiff has caused his arrest on grounds of trespass and that there have been unsuccessful attempts to arbitrate the dispute.
13. The Defendant further testified that there is a time the Plaintiff sprayed his maize crop and destroyed it.



Analysis and determination

14. The Plaintiff filed his submissions on June 14, 2022. The Defendant filed his submissions on July 15, 2022. I have carefully gone through the evidence adduced by the Plaintiff as well as that of the Defendant. I have also considered the submissions filed by the parties. The consent which the Advocates recorded on April 11, 2018 effectively consolidated the two cases. The issues which therefore emerge for determination are firstly whether the Plaintiff has proved that he has acquired the suit property by way of adverse possession and secondly whether the parties are entitled to their respective claims in the two suits.
15. It is trite that a party is bound by his pleadings. In the instant suit, the Plaintiff pleaded that he had acquired the suit property by way of adverse possession. The entire suit property is 4.814 hectares which is about 12 acres. The evidence which emerged during the hearing is that the Plaintiff had purchased only 0.4 of an acre. This was not pleaded and evidence which does not go to support the pleadings is better ignored.
16. However, be that as it may, I will go ahead to determine whether the Plaintiff has proved that he has been in exclusive and peaceful occupation of the 0.4 of an acre for the statutory period of 12 years. In his submissions, the Plaintiff is claiming to be entitled to 1.8 acres by way of adverse possession. This is not supported by even his own evidence.
17. The Plaintiff was bound to prove not mere possession of the suit property, but possession that was *nec vi, nec clam, nec precario*, that is to say, peaceful, open and continuous. (see *Kimani Ruchine v Swift Rutheofords Co. Ltd* (1980) KLR 1500 and *Karnataka Board of Wakf v Government of India & others* (2004) 10 SCC 779) which was cited by the Court of Appeal in *Christopher Kioi & another v Winnie Mukolwe & 4 others* (2018) eKLR
18. In the instant case, the Plaintiff admitted in his own evidence that after he purchased the first three points in 2000, the Defendant refused to grant him possession. He forcefully took possession. His possession after this was not peaceful as confirmed from the numerous confrontations which ended up at the Chief's office and finally Assistant County Commissioner without any success. A person who forcefully takes possession of a property cannot claim to have acquired it by adverse possession.
19. On March 15, 2006, the Plaintiff and the Defendant appeared before the Chief where it was agreed that the Plaintiff purchases half a point at Kshs 12,500/= . The Plaintiff also agreed that he was to pay Kshs 7,500/= to enable the Defendant to take him to the Land Control Board. In addition, it was agreed that the Plaintiff was to pay an additional Kshs 5,000/= for every point he had purchased. There is no evidence that the Plaintiff ever paid the agreed sum arising from the agreement of March 15, 2006 before the Chief. This being the case he cannot claim adverse possession unless he can show that he cleared what had been agreed in the agreement of March 15, 2006. Possession based on a sale agreement becomes adverse from the date of payment of last installment. (See *Peter Mbiri Michuki v Samuel Mugo Michuki* (2014) eKLR
20. The import of the agreement of March 15, 2006 is that it made the agreements of January 25, 2000, February 21, 2000 and the one of September 24, 2004 subject to it. Time for purposes of limitation



could not therefore run as the Plaintiff was on the suit property subject to completion of the purchase price. In *Samuel Miki v Jane Njeri* Richu CA No 122 of 2001, the Court of Appeal held that:-

“It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance of an agreement of sale or lease or otherwise.”

Disposition

21. From the above analysis, it is clear that the plaintiff's claim for adverse possession is misconceived. The same is dismissed with costs to the defendant. On the other hand, the plaintiff's claim in ELC 42 of 2017 as amended on April 20, 2017 is allowed as prayed.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF MARCH, 2023.

E. O. OBAGA

JUDGE

