



**Bor v Kirwa (Environment & Land Case 138 of 2016)
[2023] KEELC 16941 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 138 OF 2016**

EO OBAGA, J

APRIL 20, 2023

BETWEEN

GILBERT KIMUTAI ARAP BOR PLAINTIFF

AND

SAMUEL KIPSANG KIRWA DEFENDANT

JUDGMENT

1. On 26/5/2016, the Applicant filed an Originating summons against the Respondent in which he sought the following reliefs:-
 1. The Applicant Gilbert Kimutai Arap Bor has obtained title by way of adverse possession over the whole of land reference Pioneer Ngeria Block 1 (EATEC) 3525 having been in uninterrupted possession of the same since 2000.
 2. The Respondent's title over land reference number Pioneer Ngeria Block 1 (EATEC) 3525 has been extinguished by dint of adverse possession and the *Limitation of Actions Act*.
 3. Land reference number Pioneer Ngeria Block 1 (EATEC) 3525 be transferred by the Respondent to the Applicant Gilbert Kimutai Arap Bor.
 4. A vesting order do issue vesting land reference number Pioneer Ngeria Block 1 (EATEC) 3525 to the applicant Gilbert Kimutai Arap Bor.
 5. The Respondent be ordered to transfer land reference number Pioneer Ngeria Block 1 (EATEC) 3525 to the Applicant Kimutai Arap Bor failing which the Deputy Registrar of the honourable court do execute the documents necessary to effect a transfer into the Applicant's name and the Land Registrar Uasin Gishu County do issue a fresh title deed in the name of the Applicant Gilbert Kimutai Arap Bor.
 6. The Respondent do pay the costs of the Originating summons to the applicant.



Background

2. The suit property was originally registered in the name of East African Tanning and Extract Limited (EATEC) which had huge tracts of land within Uasin Gishu County. When EATEC decided to dispose of its properties, it appointed its sister companies who had part of its land registered in the names of the sister companies who then transferred the subdivided portions to individuals and groups.
3. LR No Pioneer Ngeria Block 1 (EATEC) 3526 (suit property) was registered in the name of Lonrho Agribusiness E. A Limited on 23/1/2001 which then transferred the same to the Respondent who became the registered owner on 28/5/2004.
4. Prior to the transfer of the suit property to the Plaintiff, Lonrho Agribusiness E.A Limited (Lonrho) had intended to sell the suit property to Kapsaret Self Help Group (The group). The suit property before registration was known as plot K8 measuring 5 acres. The group failed to pay for the plot and the same was repossessed and sold to the Respondent.
5. The group had filed a suit against Lornho & others in 2003 in Eldoret High Court Civil Case No 83 of 2003 which later became Eldoret Environment & Land case No 123 of 2012. In this suit, the group was seeking to recover from the Defendants, the suit property among others. This suit was however dismissed for non-attendance on 23/10/2017.
6. On 8/2/2017, the Respondent in this suit filed Eldoret E & L case No 44 of 2017 against Gabriel Tarus in which he claimed the following reliefs: -
 - a. An order of declaration that the plaintiff is the rightfully registered and legal owner of all that parcel of land known as Pioneer Ngeria Block 1 (EATEC)/3525.
 - b. An order of permanent injunction to restraint the defendant from entering into, ploughing, developing and in any other way interfering with the Plaintiff's use and enjoyment of his parcel of land known as Pioneer Ngeria Block 1 (EATEC)/3525.
 - c. Special damages.
 - d. General damages.
 - e. Costs of this suit and interest thereon at court rates till payment in full.
7. The parties in this suit agreed that the outcome of this suit would determine the fate of Eldoret E & L case No 44 of 2017. On 17/12/2018, the Originating summons was converted into a plaint and the replying affidavit into a defence. The court directed that the suit proceeds by way of viva voce evidence.

Plaintiff's case

8. The Plaintiff testified that he entered the suit property in the year 2000. He proceeded to fence the same and has been planting trees, growing grass for cows and growing maize on it since then. He further testified that he put Gabriel Tarus as caretaker. He further stated that he has been enjoying peaceful occupation of the suit property since 2000 with the knowledge of the previous owners including the Respondent who is the current registered owner of the suit property.
9. The Plaintiff called his caretaker Gabriel Tarus and two other witnesses who all testified that it's the Plaintiff who has been occupying the suit property since 2000 and that all the developments on the suit property belong to the Plaintiff. PW4 Gabriel Tarus testified that he resides on a plot next to the Plaintiff's land but he is the one who takes care of the suit property on behalf of the Plaintiff who is his brother.



10. PW4 further testified that one Father George was claiming the suit property through purchase but that Lonrho disowned his claim. Both PW2 and PW3 confirmed that it is the Plaintiff who has been utilizing the suit property and no any other person has attempted to do since the year 2000.

Defendant's case

11. The Defendant testified that he has a number of properties which he purchased from EATEC. He further stated that when he purchased the suit property, he went there seeking to take possession. He found someone on the suit property. He went back to EATEC who informed him that they had intended to sell the suit property to the group but the group failed to pay for it.
12. The Defendant went on to state that he obtained title on 28/5/2004. The Defendant called DW2 Andrew Komen Kibet, the in-charge of the ELC Registry who produced E & L case file No 123 of 2022 and E & L case No 44 of 2017.
13. The Defendant also called DW3 David Kipkosgey Korir who testified that he was an employer of Lonrho until 2007. He stated that he now handles Lonrho matters as a consultant. He gave the history of how the suit property was earmarked for sale to the group but the group did not raise money and the plot was repossessed and sold to the Defendant.
14. DW3 further testified that it is Gabriel Tarus who has been occupying the suit property and that he is aware that the Plaintiff herein, Gabreil Tarus and Father George Cheboryet are brothers. He further stated that he is aware that the Respondent has filed a suit against Gabriel Tarus seeking to restrain him from occupying the suit property.

Analysis and determination

15. Parties were directed to file their submissions. The plaintiff filed his submissions on 27/2/2023 and supplementary submissions on 13/3/2023.
16. I have considered the submissions by the parties as well as the evidence adduced by the parties. The only main issue for determination is whether the Plaintiff has met the threshold for him to be declared as having acquired the suit property by way of adverse possession.
17. For one to acquire property which is registered in another person's name, he has to prove that he has been in that property for a period of at least 12 years. He has also to show that he entered the property peacefully and that the owner has known that he is in possession and has never for that period tried to interrupt the possession. He has also to show that the entry was without the permission of the of the owner and where the property has changed hands, that the new owner did not interrupt that possession and did not take any effective steps to interrupt the possession.
18. In the instant case, the suit property was initially registered in the name of EATEC which has a relationship with Lonrho. Lonrho was registered as owner of the suit property on 23/1/2001. Lonrho later transferred the suit property o the Defendant on 28/5/2004. The Plaintiff testified that he entered the suit property in the year 2000. His entry was without the consent of either EATEC or Lonrho.
19. EATEC or Lonrho did not take any steps to interrupt the Plaintiff's possession. When the suit property was transferred to the Defendant on 28/5/2004, the Defendant did not take any steps to interrupt the possession of the Plaintiff. The Defendant himself testified that when he purchased the suit property, he went to the ground in a bid to take possession but he found that the property was occupied.
20. The plaint in Eldoret High Court Civil Case No 83 of 2003 was further amended on 8/2/2007 and the Defendant herein was brought on board as the 4th Defendant. Despite the Defendant herein knowing



that there was someone on his land, he did not take any steps to have him removed. The Plaintiff who was in possession since 2000 filed the present originating summons on 26/5/2016 seeking to have him declared as having acquired the suit property by way of adverse possession.

21. It is after the filing of the present suit that the Defendant for the first time filed a suit against Gabriel Tarus on 8/2/2017 seeking to assert his right over the suit property. This case was not against the Plaintiff. The person who was sued was an agent of the Plaintiff as the evidence adduced shows. Gabriel Tarus owned an adjacent property being LR No Pioneer Ngeria Block 1(EATEC) 3526 which is registered in his wife's name.
22. As at the time of filing Eldoret ELC No 44 of 2017, already the period prescribed in law of 12 years had expired. The Plaintiff was not specific as to the date he took possession. He said he took possession in 2000 without specifying the date. However, be that as it may even if one were to calculate the time from 23/1/2001 when Lonrho was registered as owner of the suit property, the 12 years' period would have ended on 23/1/2013.
23. Time for purposes of limitation started running in 2000 when the suit property was in the name of EATEC. When the suit property was registered in the name of Lonrho on 21/1/2001 time was still running. Even when the suit property was transferred to the Defendant on 28/5/2004, time did not stop running.
24. In the case of *Githu v Ndete* the Court of Appeal held as follows: -
 - " 1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession."
25. The entry of the Plaintiff was peaceful. The Defendant claimed while under cross examination that he had fenced the suit property but that the barbed wire fence was destroyed. This cannot be true. In his evidence in chief and the replying affidavit to the Originating summons, he was categorical that he did not take immediate possession as he was engaged elsewhere outside the land. He went on to state that when he went back to take possession, he found Gabriel Tarus who had tilled the land. He asked him to move out but he did not forcing him to file Eldoret ELC 44 of 2017. He denied knowledge of Originating Summons No 138 of 2016 alleging that he was not served with summons in that case.
26. During cross examination, the Defendant maintained that he has never taken possession. The claim that he fenced the land is not true. This was meant to show that the plaintiff entered the land by force which is not the case. In re-examination by his lawyer, he admitted that he passes by the suit property and that he has not taken possession because of this case.
27. I found the evidence of the plaintiff to be credible. It was not shaken during cross examination. The plaintiff testified that he is a lecturer at the Catholic University of Eldoret. He had to rely on Gabriel Tarus to take care of the land. There is no law which forbids one from engaging the services of a caretaker. What the law envisages is that one has to have actual possession which would qualify one to be declared as having acquired the land by way of adverse possession.
28. The Defendant testified that he asked Gabriel Tarus to move out of the land but he did not move out. This is not an effective way of asserting one's right to property. In the case of *Githu v Ndete (Supra)*, the Court of Appeal stated as follows:-

"Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. giving notice to quit cannot



be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

29. Even if the Plaintiff and Gabriel Tarus are brothers, nothing in law prevents a person from engaging his relative as a caretaker. The Plaintiff entered the suit property not under sale. He is not claiming the suit property on the basis of occupation by his brother Gabriel. The Plaintiff engaged his brother Gabriel to take care of the land. If father George is the one who would had filed the suit based on alleged purchase, his claim would not have succeeded as he would be on the suit property pending conclusion of the sale transaction.

Disposition

30. From the above analysis, it is clear that the Plaintiff has proved all the conditions required for one to acquire the suit property by way of adverse possession. I therefore find that the Plaintiff has proved his case on a balance of probabilities. I accordingly enter judgement in his favour in terms of prayers 1, 2, 3, 4, 5 and 6 of the Originating summons filed in court on 26/5/2016. This judgement effectively renders Eldoret ELC Case No 44 of 2017 moot. This file is accordingly ordered closed.

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

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Momanyi for Plaintiff.

Mr. Korir for Ms. Kipseii for Defendant.

Court Assistant –Laban

