



**Chebii v Mogin (Environment & Land Case 62 of 2022)  
[2023] KEELC 16865 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16865 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 62 OF 2022**

**L WAITHAKA, J  
APRIL 18, 2023**

**BETWEEN**

**MICHAEL TOROTICH CHEBII ..... PLAINTIFF**

**AND**

**PETER YATICH CHEBII MOGIN ..... DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated 28<sup>th</sup> January 2013 and filed on 15<sup>th</sup> February 2013, the plaintiff instituted this suit inter alia seeking to be declared the owner of half share of the parcel of land known as Elgeyo Marakwet/Kapsowar/1805 (hereinafter referred to as the suit property) by adverse possession.
2. The application/suit is supported by the affidavit of the plaintiff in which he has deponed that the suit property belonged to his father, Chebii Mogin (deceased); that the defendant, who is his elder brother, was registered as the proprietor of the suit property in 1977 long after his father had passed on (their father passed on in 1962) and that he was in use and occupation of half share of the suit property when the defendant got registered as proprietor.
3. Further that he continued living on his half share of the suit property even after the suit property was registered in the name of the defendant; that he has been in exclusive use of his half share of the suit property since that time and that there were disputes/suits between him and defendant over the suit property.
4. In reply and opposition to the application/suit, the defendant has, through the replying affidavit he swore on 8<sup>th</sup> May 2013, deponed that the suit property is his share of inheritance; that the plaintiff has never lived in the suit property or cultivated it; that the plaintiff's son forcefully entered the suit property and erected structures thereon. Arguing that the plaintiff has not made up a case for being granted the orders sought, the defendant points out that there were cases between him and the plaintiff which made time for purposes of adverse possession not to run in favour of the plaintiff.



5. Pursuant to directions given on 16<sup>th</sup> October 2013, the originating summons and the affidavit sworn in support thereof were converted into a plaint and the replying affidavit into defence and the suit set down for hearing by viva voce evidence.

## EVIDENCE

### The Plaintiff's case

6. The plaintiff who testified as P.W.1 informed the court that the defendant is his brother; that his father died in 1962 and that by the time his father died, they were living in the suit property; that he had lived on his half share of the suit property for over 40 years; that the suit property was later subdivided into parcels 2453 and 2454. His portion is 2453; that there were previous proceedings over the matter both in court and before the Land Disputes Tribunal. He produced several exhibits in support of his case.
7. PW2, Stephen Kosgei Torotich, a son of the plaintiff and a nephew of the defendant, relied on his statement recorded and signed on 10<sup>th</sup> February, 2014 after it was adopted as his evidence in chief. The statement is to the effect that he stays in the suit property and had lived there since birth; that he farms one acre thereof and that his brothers, Luka Torotich, Attanas Kibor and Nathan Kibet Torotich also live in the suit property; that they have lived in their father's share of the suit property measuring 9 acres; that his father also uses a portion of the suit property that the defendant has never evicted them from the suit property.
8. informed the court that the defendant is the one currently farming the land but there are developments thereon belonging to his brother, Nathan Kibet. He stated that his father does not live in the suit property as he lives in parcel No.1825.
9. In cross examination, P.W.2 stated that he used to cultivate the suit property but has never stayed there; that his brother built a house in the suit property but is currently not living there; that they moved out of the suit property sometime in 2013 after their father was jailed for contempt of court. Before then, he used to graze his cattle in the suit property. He informed the court that his family lives in 1825 which is not ancestral land.
10. He testified that he was born in land parcel 1825. The house in the suit property (Pexbt 6), was built by his brother. His father had a house in the suit property which was burnt down by the defendant in 2014.
11. In re-examination, P.W.2 stated that parcel number 1805 (the suit property) and 1825 have no boundary. They use the plot as one as opposed to two distinct plots.
12. Michael Chebii, a son of the plaintiff and a nephew of the defendant relied on his statement recorded on 10<sup>th</sup> February, 2014 after it was adopted as his evidence in chief. The statement is to the effect that he stays in the suit property and that he had stayed there since 1984, when he was born; that his father showed him where to build. He had been cultivating one acre of the suit property and grazing cattle on the remaining portion of his father's 9 acres share of the suit property. His brothers, Luka Torotich, Attanas Kibor, Stephen Torotich and his father also use the suit property. His uncle, the defendant, has never evicted them from the suit property.
13. He corroborated the evidence of P.W.2 to the effect that he has a house in the suit property (Pexbt 6) and that they no longer live in the suit property. They stopped living in the suit property after their father was jailed for contempt of court. His father and the defendant were fighting over plot number 2453 which is a subdivision of the suit property claimed by his father.



14. In cross examination, P.W.3 stated that he was born and raised in parcel 1825 and not parcel 1805 as stated in his statement; that he has built a two bedroomed house in parcel 2453. Although his brother and father had houses in the suit property, only his house remains as the other houses were demolished.
15. Before he was cited for contempt of court, his father was tilling almost the whole of the suit property.
16. further informed the court that plot number 1825 is not family land, though it was initially registered in his grandfather's name. He maintained that before his father was cited for contempt he (his father) was utilizing the suit property.
17. Jane Cheptoo, a nurse, informed the court that on 7<sup>th</sup> March 2014, she examined and treated the plaintiff after he reported a case of assault by persons known to him. (Evidence not relevant to the pleaded case save for confirming the plaintiff's use and occupation of the suit property was not peaceful).
18. Reuben Kimutai, a surveyor, produced maps in respect of land parcels 1805, 2453 and 2454 which are subdivisions of 1805. He informed the court that subdivision was done in 2003 and Registry Index Map (RIM) amended. He produced the RIM as Pexbt 11.
19. In January 2020, parcel number 2453 and 2454 were amalgamated and reverted back to 1805.
20. In cross examination, he stated that the subdivision was based on a mutation brought to the surveyor; that he was not the one who surveyed the suit property. He could not state what triggered the amalgamation of the suit property in 2020.
21. In re-examination, he stated that by the time a map is amended, it has to go through all the processes of subdivision.

### **The Defendant's case**

22. The Defendant, Peter Chebii Mogin, who testified as D.W.1, relied on his statement recorded and signed on 18<sup>th</sup> February 2015 after it was adopted as his evidence in chief. The statement is to the effect that the plaintiff is his younger brother; that his father, Chebii Mogin (deceased) had three parcels of land, 1/1825 and 1805 which he had shared amongst his three sons before he passed on; that in 1994 a dispute arose between him and the plaintiff over ownership of 1805; that the dispute was resolved by elders and the court vide Iten SRMC land case No.9 of 1994 and SRMC Case No.15 of 2010; that the plaintiff has not been living in the suit property as claimed and has never had peaceful use and enjoyment of the suit property as they had numerous cases in respect thereof. He further stated that the plaintiff was committed to civil jail and ordered not to trespass the suit property.
23. Concerning the plaintiff's contention that he bought parcel number 1825, he termed that statement untrue and stated that the plaintiff was given the parcel after they subdivided their family land. He reiterated his statement that the plaintiff had taken him to court in 1994 and that he won the case. He produced certified copies of proceedings and judgment in Iten SRMC Case No.9 of 1994 as Dexbt 1 and 2 respectively. He also produced the order issued in that case restraining the plaintiff from entering the suit property as Dexbt 3. The defendant informed the court that the dispute had earlier on been taken to the Land Disputes Tribunal which found in favour of the plaintiff.
24. He informed the court that he did not agree with the decision of the Tribunal. He produced the proceedings, ruling and order issued pursuant to the proceedings before the Tribunal as Dexbt 4 (a), (b) and (c) respectively.



25. Maintaining that the plaintiff has never lived in the suit property, he stated that the photographs produced by the plaintiff as Pexbt 5(a) to (e) are for a house built by his elder sister after he allowed her to stay in the suit property with her children after she left her matrimonial home.
26. With regard the photograph produced by the plaintiff as Pexbt 6(d), he stated that it is in respect of trees and cows in the plaintiff's parcel of land, 1825. He further stated that the person in the photograph produced as Pexbt 6(e) is unknown to him.
27. Contrary to the plaintiff's claim that parcel numbers 1825 and 1805 are adjoining each other, he stated that the parcels are separated from each other by about 10 other parcels of land.
28. He denied having signed the application form to be presented to the Land Control Board (LCB).
29. In cross examination, he stated that the plaintiff was born in 1954 and that his father died in 1962 before he subdivided his land. His father was living in parcel 1815 owned by his brother, Kwambai; that they were all living in 1815. However, by the time subdivision was done they were all living in the parcels they occupy today.
30. Concerning the case filed by the plaintiff in 1994, he stated that other than knowing that it is about parcel number 1805 he does not know the details of the case. He denied the plaintiff's allegation that they had sat as a family and agreed that he gives the plaintiff a portion of the suit property. Terming the plaintiff's allegation false, he stated that if the allegations are true, his other brother would also be laying a claim on the suit property.
31. Concerning the mutation forms (Pexbt 3) produced by the plaintiff and which he is said to have signed, he stated that the forms are strange to him.
32. Regarding the circumstances upon which plot number 1805 was restored after subdivision, he stated that in 2019 he went to the office of the County Surveyor and found that parcel 1805 had been subdivided into 2453 and 2454. He informed the surveyor that the subdivision had been instigated by the plaintiff and they agreed to amalgamate the subdivisions into 1805. He never filed any case against the plaintiff.
33. He acknowledged that there are structures erected on the suit property but contended that they were not built by the plaintiffs' sons as alleged. He asserted that he built the structures for his sister.
34. He denied the allegation that he assaulted the plaintiff and stated that he was not charged with any assault case.
35. He stated that he is not aware of any dispute between Joseph Kipketur and the plaintiff over plot number 1825.
36. He informed the court that they shared their family land through balloting; that there was no case in 2014 and there was no court order issued then restraining him from entering parcel number 2453. He admitted that he was jailed for 9 months but stated that he was jailed for failing to attend court and not for disobeying a court order.
37. In re-examination, he stated that he neither knows the person whose signature appears in the LCB application form (Pexbt 4), nor the person who prepared the form.
38. He maintained that he is not aware of the mutation form (Pexbt 30) and that he did not sign the form.



39. He could not tell the procedure used by surveyors to amalgamate parcels 2453 and 2454 back to 1805. He stated that he merely complained to the surveyor at Iten and the plots were amalgamated back to 1805.
40. He was never served with an order restraining him from entering parcel number 2453.
41. He maintained that he never beat up or injured the plaintiff in 2014.
42. D.W.2, Edward Kipkurui Chesang, relied on his statement recorded on 18<sup>th</sup> February, 2015 after it was adopted as his evidence in chief. The statement is to the effect that the plaintiff has his own parcel of land and that he has never lived in the suit property. He lost his claim to the suit property in court.
43. In cross examination, he stated that he was present during distribution of the parties' family land and no balloting took place; that the family was living in parcel 1825 and that the suit property is bigger than parcel 1825.
44. He testified that before 1994, the parties were living in peace; that the dispute arose when they failed to agree about parcel number 1805.
45. In re-examination, he stated that the sons of the deceased are three; that Peter (defendant) is the youngest and that the third son has land elsewhere.
46. D.W.3, William Torotich Chepkonga, relied on his statement recorded and signed on 18<sup>th</sup> February, 2015 after it was adopted as his evidence in chief. He stated that the plaintiff and the defendant have had this land dispute for a long period of time, since the land was subdivided. The plaintiff lives in parcel 1825 while the defendant lives in parcel 1805. The parties' deceased father was not living in parcels 1805 or 1825 but lived in a different parcel of land; that there are no houses erected in parcel 1805 other than those of the defendant.
47. D.W.4, Kwambai Chebii Kimutai, relied on his statement recorded and signed on 18<sup>th</sup> February, 2015 after it was adopted as his evidence in chief. He testified as follows; the defendant is his elder brother; that when his father was alive they were living in the parcel of land he is currently living in; that his father is buried in a parcel of land not occupied by any of his sons; that their father's land was shared after their father died and each of them was given the parcels they are currently occupying. The sharing of land was done by their uncle Joseph Mugil in the presence of many people and there was no balloting. The land was shared according to the parcel each of them was occupying.
48. He stated that Stephen and Michael have never lived in the suit property; that they lived in peace until 1994 when Michael (plaintiff) brought a case against Peter (defendant) after obtaining title for parcel 1825 and realizing that his parcel of land is smaller than that of Peter (parcel 1805).

### **Analysis and determination**

49. From the pleadings, the evidence and the submissions, one issue/matter arises which is departure from pleadings/contradictions in evidence
50. With regard to this issue, it is noted that both the plaintiff and the defendant led evidence at variance with their pleadings thus offending the provisions of Order 2 Rule 6(1) of the Civil Procedure Rules which provides as follows:-

“No party may in any pleadings make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”



51. The plaintiff did that by leading evidence to the effect that it is his children who were in use and occupation of the suit property yet he had pleaded that he began living in the suit property long before it was registered in the name of the defendant. He also did so by leading evidence to the effect that he was in occupation of the suit property through his employee yet those facts are not alluded to in his pleadings. By shifting goal posts on his alleged use and occupation of the suit property, the plaintiff struck this court as an untruthful litigant not worthy the trust of the court.
52. The defendant also deviated from his pleadings by asserting and leading evidence to the effect that neither the plaintiff nor his sons were in use and occupation of the suit property yet he had pleaded that the plaintiff's son forcefully entered the suit property in 2007 and erected structures thereon. In that regard, see paragraph 8 of the defendant's replying affidavit where he had deponed as follows:-
 

“ 8. That in reply to paragraph 9 of the affidavit of the defendant wish to state that the plaintiff has never settled on the land and his son put structures on the land in the year 2007 and has never cultivated on the land nor occupied the land”.
53. That averment renders the defendant's claim that neither the plaintiff nor his son lived or occupied the suit property unbelievable.
54. It is trite law that parties are bound by their pleadings. In that regard, see the case of Independent and Electoral Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others (2014)e KLR where the Court of Appeal quoted with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC 91/2002 thus:-
 

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence of the parties which does not support averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as it enables parties to prepare their evidence on the issues joined and avoid any surprises by which no party is given opportunity to the other party to meet the new situation.”
55. Having pleaded that he was in use and occupation of the suit property way before the defendant got registered as proprietor thereof in 1977, it was not open to the plaintiff to depart from that pleading and by way of evidence attempt to prove that it was not him who was in occupation but his children or employee and that the occupation was not since 1997 when the defendant was registered as the proprietor of the suit property but in 1993 or 1994 after the elders decided that the suit property should be divided into two equal parts and shared between him and the defendant. Equally, the defendant is estopped from leading evidence tending to prove that the plaintiff's son was never in occupation of the suit property when through his pleadings he had admitted or acknowledged that fact.
56. On account of the plaintiff's inconsistent and contradictory claim concerning his alleged occupation and use of the suit property, it is not easy to determine with certainty whether the plaintiff was in use and occupation of the suit property for the time required to acquire title to land registered in the name of another person by adverse possession.
57. Being the one who desired judgment based on his allegation that he had been in use of the suit property for more than the time provided for in law for acquiring land by adverse possession, it behooved the plaintiff to lead evidence capable of showing when he entered the suit property and that he had enjoyed peaceable use and occupation of the suit property. In the circumstances of this case, no evidence was adduced capable of showing that the plaintiff was in use of the suit property for at least 12 years and/



or that his use and occupation was peaceful. The evidence led in this case shows that from 1994 or thereabout, when the plaintiff began laying claim to the suit property, there were orders issued by court which restrained him from dealing with the suit property. That kind of use and occupation cannot meet the threshold of peaceful use and occupation of land belonging to another as of right to hinge the plaintiff's claim for adverse possession.

58. The upshot of the foregoing is that the plaintiff's claim as far as it is premised on the doctrine of adverse possession is without merit and is for dismissal. Consequently, I dismiss it with costs to the defendant.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 18<sup>TH</sup> DAY OF APRIL, 2023.**

**L. N. WAITHAKA**

**\*JUDGE**

**Judgment delivered virtually in the presence of:**

**Ms. Mercy Omuya holding brief for Mr. Musundi for the plaintiff.**

**Dr. Chebii for the defendant.**

**Court Asst.: Thomas**

