



REPUBLIC OF KENYA



Ichikan (Suing as Legal Representative of the late Ekutani Nadiko Ereka) & 2 others v Naran & 3 others (Environment & Land Case 51 of 2020) [2023] KEELC 16882 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 51 OF 2020**

EO OBAGA, J

APRIL 18, 2023

BETWEEN

**ISAIAH ICHIKAN (SUING AS LEGAL REPRESENTATIVE OF THE LATE EKUTANI NADIKO EREKAI) 1ST APPLICANT
JOSEPH SANYO EREGAI 2ND APPLICANT
JOSEPH KIPKEMBOI KETER 3RD APPLICANT**

AND

**SHIVJI RAMJI NARAN 1ST RESPONDENT
LALJI SHANJI KERAI 2ND RESPONDENT
THOMAS KIPROTICH TALAM 3RD RESPONDENT
LAND REGISTRAR, UASIN GISHU COUNTY 4TH RESPONDENT**

JUDGMENT

1. The Applicants filed an Originating Summons against the Respondents in which they sought the following reliefs: -
 - a) That the Applicants have obtained title over that parcel of land No. Eld/Mun/Block14/677 and 678 by way of adverse possession for having actually, openly, notoriously, exclusively and peacefully occupied the said parcel of land for a period exceeding 12 years [1980].
 - b) That the 1st Respondent's Title over 0.1900 HA each on land reference No. Eld/Mun/block 14/677 and 678 has been extinguished by dint of adverse possession and/or the *Limitation of actions Act*.



- c) That the foresaid parcel of land known as No. Eld/Mun/block 14/677 and 678 be transferred to the Applicants.
 - d) That a vesting order do issue vesting 0.1900 ha each on land reference No. Eld/Mun/block 14/677 and 678 to the Applicants herein Ekutani Nadiko Ereikai, Joseph Sanyo Eregai and Joseph Kipkemboi Keter.
 - e) That the 1st Respondent be ordered to transfer the parcel of land No. Eld/Mun/block 14/677 and 678 to the Applicants failure to which the Deputy Registrar of this Honourable Court do execute the documents to effect a transfer into the Applicant's name and the Land Registrar Usain Gishu County do issue a Title document for the said land in the Applicants names.
 - f) That the 1st, 2nd and 3rd Respondents do pay the Applicants the costs of this suit/summons.
2. The 1st, 2nd and 3rd Respondents who were duly served neither entered appearance nor filed a replying affidavit to the Originating summons. The 4th Respondent through a state counsel appeared in court and indicated that the Attorney General did not wish to file a replying affidavit to the Originating summons. The state counsel only pleaded that the Attorney General should not be condemned to pay costs of the suit.
 3. The 1st Applicant (now deceased) died on 12/9/2020. One of his sons took out a limited grant for purposes of continuing this case on his behalf. The 2nd Applicant is son of the deceased 1st Applicant.
 4. The deceased moved into LR. Nos Eldoret Municipality/Block 14/677 and 678 (suit properties) in 1980 whereby he built structures on the suit properties and started cultivating on it. The deceased raised his family on the suit properties and haD been peacefully staying on the suit properties with his family until his demise on 12/9/2020. The deceased's son Isaiah Ichikan obtained a limited grant for purposes of carrying on with the suit which his father had started.
 5. The Applicants produced letters from the area chief who knew the deceased who was staying on the suit properties until he died. The area chief also wrote other letters confirming that since the demise of the deceased, his children are still residing on the suit properties as their mother is also deceased.
 6. PW1 Isaiah Ichikan testified that he is 26 years old and he has been living on the suit property since he was born. He testified that he has never seen the Respondents in this case. They have been staying on the suit properties without any interruption.
 7. PW2 Joseph Sanyo Eregai testified that he has been residing on the suit properties since 1995 when he was born. He was staying with the deceased who was his father. PW3 Joseph Kipkemboi Keter testified that he knew the deceased who used to visit their home. He also stated that he knew the children of the deceased and that the deceased and his children have been residing on the suit properties since 1998 when he knew the family of the deceased.
 8. The evidence of the Applicants was not controverted but I must be satisfied that the Applicants have satisfied the threshold for grant of order of adverse possession. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, adverse possession was described as follows: -

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”



9. For one to acquire land by way of adverse possession, he has to demonstrate that he has been in peaceful, open and continuous possession. In Latin, the possession has to be *nec vi, nec clam, nec precario* as was stated in the case of *Kimani Ruchine & others v Swift Lothberford & Co. Ltd and another* [1972] eKLR.
10. It has been held that adverse possession is attached to the land and not title as was held in the case of *Maweu v Lin Ranching and Farming Co-operative Society* (1985) eKLR as quoted in Civil Appeal No. 164 of 2011 *Gachuma Gacheru v Maina Kabuchwa* (2016) eKLR where the Court stated as follows: -

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in a title.”
11. In the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, it was held as follows: -

“ Strictly for one to succeed in a claim for adverse possession, one must prove and demonstrate that he had occupied the land openly, that is, without force, without secrecy, and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in latin phraseology *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.”
12. In *Mbira v Gachubi* [2002] 1 EALR 137, the court held as follows: -

“ ... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption.”
13. In *Wambugu v Njuguna* [1983] KLR 174 which was cited in *Karunthi Taiji v M'makinya* [2013] eKLR, it was held as follows: -

“ In order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land by either being disposed of it or by having discontinued his possession of it.”
14. It is in light of the principles set out in the above cases that I will decide this suit. The deceased entered the suit properties in 1980 where he lived with his family until he died on 12/9/2020. He had been on the suit property for 40 years. For all the 40 years, no one came to interrupt his possession. The deceased was staying on the suit properties openly and without secrecy. He built his houses on the suit properties and cultivated on the same as his own properties. The photographs which were produced are evidence of intention to possess the suit properties as his own.
15. The 2nd Applicant filed this suit on his own behalf. He was born on the suit property in 1995. He has resided on the suit property for 25 years as at the time he filed this originating summons. He has never been interrupted in his occupation. He has his own house on the suit properties where he resides. Though the deceased initially came in as a caretaker, his stay became adverse to the registered owner the moment the registered owners went away in 1985 not to be heard or seen. In other words, the owners had lost their possession.
16. It is therefore clear that the 1st and 2nd Applicants have proved all the requirements for them to be registered as owners of the suit properties in place of the registered owners. I therefore allow the Originating summons dated 25/8/2020 in the following terms: -



- a) That Isaiah Ichikan and Joseph Sanyo Eregai have obtained title over Eldoret Municipality/Block 14/677 and 678 by way of adverse possession.
- b) That the Respondents title over LR. No Eldoret Municipality/Block 14/677 and 678 has been extinguished by dint of the Limitation of Actions Act.
- c) That title for Eldoret Municipality/Block 14/677 and 678 be transferred to Isaiah Ichikan and Joseph Sanyo Eregai.
- d) That a vesting order do issue vesting LR. No. Eldoret Municipality/Block 14/677 and 678 to Isaiah Ichikan and Joseph Sanyo Eregai.
- e) That the Respondents are hereby ordered to transfer LR. No. Eldoret Municipality/Block 14/677 and 678 to Isaiah Ichikan and Joseph Sanyo Eregai failing which the Deputy Registrar of this court do execute the documents to effect transfer of LR. No. Eldoret Municipality/Block 14/677 and 678 into the names of Isaiah Ichikan and Joseph Sanyo Eregai.
- f) The Land Registrar Uasin Gishu County to ensure that titles in respect of LR. Nos. Eldoret Municipality/Block 14/677 and 678 are registered in the name of Isaiah Ichikan and Joseph Sanyo Eregai.
- g) The 1st, 2nd and 3rd Respondents to pay costs of this suit to the Applicants.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF APRIL, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Omboto for Applicants

Court Assistant –Laban

E. O. OBAGA

JUDGE

18th APRIL, 2023

