



**Metto & another v Chumba (Environment & Land Case 53 of 2019)
[2023] KEELC 19345 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 19345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 53 OF 2019**

EO OBAGA, J

MAY 31, 2023

BETWEEN

PHILIP MWEI METTO 1ST PLAINTIFF

FLORENTINA MWEI 2ND PLAINTIFF

AND

JAMES CHUMBA DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs are the administrators of the Estate of the Late Joseph Kiplagat Arap Mwei (Deceased). The 1st Plaintiff is son of the Deceased whereas the 2nd plaintiff is wife of the Deceased and step mother of the 1st plaintiff.
2. The plaintiffs filed this suit against the defendant in which they claimed the following reliefs: -
 - a. A declaratory order that the defendant is not entitled to provisional plot Number 69 as set out in the area list in respect of LR 11218 Sambul Farm.
 - b. An order directing the defendant to cede the said parcel to the estate of Joseph Mwei.
 - c. An order of injunction preventing the defendant from occupying the said land.
 - d. Costs of the suit.
3. The defendant filed a defence to the plaintiff's claim and raised a counter claim in which he sought the following relief:-
 - i. An order directing that the defendant has acquired an interest over one acre in that provisional plot number 69 by way of adverse possession.



Background;

4. The Deceased was the chairman of Sambul Farm which owned LR. No 11218/2 comprising about 2125 acres (Sambul Farm). Sambul Farm originally had 35 members. After the farm was purchased from a colonial settler, the original members were settled on the farm even before the survey process was carried out. The original members sold part of their entitlement to other persons who also became members by virtue of the purchase.
5. The survey process of Sambul Farm started on or around 1996. Some members of the farm who were dissatisfied by the survey moved to the High court and filed Eldoret HCCC No. 88 of 2000 which later became ELC No. 51 of 2012 upon the transfer of the file to the Environment & Land Court. In this case, the plaintiff was claiming that during survey, some members were given more acres and some less acres. The Plaintiff therefore wanted a re-survey of the farm so that titles are given to the 35 original members who could then transfer to the respective purchasers.
6. In a judgement delivered on 8/3/2019, the court ordered that issuance of titles was to be in accordance with the numbers shown in the survey plans and the area list and that if there were any disputes which were existing or could arise after the titling process, then the affected persons were to file separate suits to urge their respective claims. It is on the basis of the judgement in ELC 51 of 2012 that the Plaintiffs filed this suit seeking to stop the Defendant from being given title in respect of plot No. 69.

Plaintiffs' case;

7. The plaintiffs' case is that plot number 69 which is one acre (Suit property) was carved out the land which was owned by the Deceased. The plaintiffs contend that the Deceased had about 191 acres within Sambul Farm. According to the evidence of the 1st plaintiff, the 191 acres belonging to the Deceased was as a result of combination of plot No. 119 and 76.
8. The 1st plaintiff testified that the Deceased did not enter into any sale agreement with the defendant regarding the one acre which the plaintiffs claim. He stated that the defendant purchased one acre from Thomas Chepkunur Lagat. He stated that Thomas Chepkunur Lagat owned plot number 53 which is far away from the Deceased's plot No. 70 and that it is not possible for Thomas Chepkunur Lagat's land to stretch to where the Deceased's land was as there were other plot owners in between Thomas Chekunur Lagat's land including school land.

Defendant's case;

9. The defendant testified that he purchased one acre from Thomas Chepkunur Lagat vide sale agreement dated 15/2/1995 at a price of Kshs 24,000/= He proceeded to build a house on the suit property and planted eucalyptus trees. In 1996, the Deceased demolished his house and violently removed him from the suit property. He stated that since then, the Deceased's family have been harvesting the trees which he had planted.

Analysis and determination;

10. The parties were directed to file written submissions. The plaintiffs filed their submissions on 15/2/2023. The Defendant filed his submissions on 3/2/2023.
11. The defendant who was the first to file his submissions submitted that the plaintiffs have no locus to bring this suit as they are not the administrators of the Estate of the Deceased. The defendant relied on the case of *Rajesh Pranjivan Chudasama v Suilesh Pranjivan Chudasama, Virginia Edith Wamboi*



Otieno v Joash Ochieng Ougo & another CA 31 of 1987 and Julia Odoyo Ongunga v Francis Kiberenge Abano CA No 19 of 2015.

12. In all the three cases cited herein above, the courts held that where one has no grant of letters of administration, he/she has no *locus standi* to file the case. The defendant further submitted that the plaintiffs had not proved their case.
13. In their submissions, the plaintiffs submitted that they had locus standi to bring the suit and that there was a confirmed grant which had been produced but that the grant had an error in that the same was expressed to have been issued to the Deceased. They argued that a grant cannot be issued to a deceased person.
14. In support of their contention that there is an error apparent on the confirmed grant, the plaintiffs relied on the case of Chandrakhant Joshibhan Patel v R (2004) TLR 218 as quoted in Zablon Mokuva v Solomon M. Choti & 3 others (2016) eKLR and Attorney General & others v Bonface Byanyima which cited Levi Onta v Uganda Transport Company. These two cases emphasized that an error apparent must be self-evident and does not require any ascertainment.
15. The plaintiffs further submitted that the defendant had not demonstrated how the suit property which was not in the sale agreement became plot 69 and how, the vendor's plot which was not adjacent to the Deceased's land could become plot number 69.
16. The plaintiffs also submitted that the defendant had not proved that he had acquired the suit property through adverse possession. The plaintiffs cited the case of Kasuve v Mwaani Investments Limited and 4 others IKLR 184 and Mtana Lewa v Kabindi Ngala Mwangandi (2015) eKLR which sets out what one is required to satisfy before one can be declared to have acquired a property by way of adverse possession.
17. Having considered the evidence adduced by the plaintiff and their witnesses as well as the defendant and his witness and the submissions by the parties herein, the issues for determination are firstly, whether the suit property was curved out of land of the deceased. Secondly, whether the plaintiff proved that the suit property, which he purchased from Thomas Chekunur Lagat belonged to the said seller. Thirdly, whether the defendant has acquired the suit property through adverse possession. Fourthly, are the parties entitled to their respective claims. Lastly, which order should be made on costs.
18. The plaintiffs through the 1st plaintiff contend that the suit property was curved out of the Deceased's land. During the hearing, the 1st plaintiff pointed out to the Registry index map (RIM) and stated that Thomas Chepkunur Lagat who purportedly sold the suit property owned plot 53. He further stated that plot 53 is not adjacent to the plot 70 which is owned by the Deceased. There was a valuation report which was produced in evidence by consent of the plaintiff's advocate and that of the defendant's Advocate as plaintiff exhibit 1. This report annexed a copy of the RIM.
19. According to the RIM attached to the valuation report, plot 69 is adjacent to plot 70 owned by the Deceased. The same RIM was too produced by the defendant as defence exhibit 7. It is clear from the RIM that plot 53 owned by Thomas Chepkunur Lagat is not adjacent to the school land which is plot 66. There is plot number 64 which is in between plot 53 and plot 66. The argument by the defendant that Thomas Chepkunur Lagat was given one acre adjacent to the land owned by the Deceased as the surveyor did not want to interfere with the school land does not hold water.
20. If the argument by the defendant was to be as he claims, then it is the owner of plot No. 64 who would have been given the one acre adjacent to the plot owned by the Deceased. It is clear that plot 69 was curved out of the land owned by the Deceased. The agreement between the defendant and Thomas Chepkunur Lagat was made on 15/2/1995. The survey was carried out the following year that is 1996.



This is the time the Defendant's name came up as owner of the suit property having allegedly purchased it from Thomas Chepkunur Lagat.

21. On the second issue, though the defendant claimed that he purchased the suit property from Thomas Chepkunur Lagat, there was no evidence adduced that that was the case. Apart from the sale agreement which was produced as exhibit 1, the alleged seller was not called as a witness though he was said to be available. There was only an allegation that he was sick and could not come to testify. It is important to note that the said Thomas Chepkunur Lagat did not even record a witness statement.
22. While dealing with the first issue, I demonstrated that it was not possible for Thomas Chepkunur Lagat to be given land adjacent to the Deceased's land as his land was not adjacent to the school land contrary to the claim by the defendant during the hearing. It is therefore clear that the defendant failed to prove that the suit property which he allegedly purchased from Thomas Chepkunur Lagat belonged to the seller.
23. On the third issue, there is no doubt that the defendant alleges to have purchased the suit property from Thomas Chepkunur Lagat on 15/2/1995. He testified that he entered into possession, planted eucalyptus trees and put up a house on it. It is his evidence that he was evicted from the suit property by the Deceased. During cross-examination, the defendant stated that he was evicted from the suit property in 1996. However, in his recorded witness statement which he adopted as his evidence, he stated that the Deceased started harassing him in 2000 and eventually evicted him from the suit property in 2001.
24. It is clear that for one to acquire land by way of adverse possession, one has to be in that land peacefully without any interruption for a period of twelve years. To begin with, the suit property is not registered. Even if one were to assume that the land was registered were to assume that the land was registered in the name of the Deceased which is not the case, the Defendant would have been expected to be on it peacefully, without interruption for at least a period of 12 years. Assuming that what the defendant started in his witness statement is true, he purchased the suit property in 1995 and was evicted in 2001. It therefore means he had been on the land for only six months which is short of the statutory twelve years required for one to acquire land by way of adverse possession.
25. The defendant knew that his claim for adverse possession could not see the light of the day that is why he did not even bother to submit on the same in his submissions. I find that the defendant's claim for adverse possession is unfounded.
26. There was an argument that the plaintiffs do not have locus to bring this suit. This argument is based on the fact that the confirmed grant which was produced by the Plaintiffs showed that it was issued to the Deceased. It is true the grant which was confirmed shows that it was issued to the Deceased. This is not possible. It is clearly an error as a grant cannot be issued to a deceased.
27. From the analysis herein above it is clear that the plaintiffs have proved their case on a balance of probabilities. I allow the plaintiffs' claim in terms of prayers (a), (b), (c), and (d) of the plaint dated 8/4/2019. On the other hand, I find that the defendant has failed to prove his counter-claim to the required standard. The same is dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF MAY, 2023.

E. O. OBAGA

JUDGE

In the virtual absence of parties who were aware of date of delivery of judgement.

Court Assistant –Henrica



E. O. OBAGA
JUDGE
31st MAY, 2023

