



REPUBLIC OF KENYA



Kiyai & 11 others v Kiyai & 8 others; Kiyai & another (Plaintiff); Kiyai & another (Defendant) (Environment & Land Case 42 & 32 of 2021 (Consolidated)) [2023] KEELC 18089 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 42 & 32 OF 2021 (CONSOLIDATED)**

MN MWANYALE, J

JUNE 15, 2023

BETWEEN

VINCENT KIPKINYOR KIYAI 1ST PLAINTIFF
VINCENT KIPKINYOR KIYAI 2ND PLAINTIFF
VINCENT KIPKINYOR KIYAI 3RD PLAINTIFF
WESLEY CHERUIYOT KIAY 4TH PLAINTIFF
WESLEY CHERUIYOT KIAY 5TH PLAINTIFF
WESLEY CHERUIYOT KIAY 6TH PLAINTIFF
MOSES KIPYEGO KIYAI 7TH PLAINTIFF
MOSES KIPYEGO KIYAI 8TH PLAINTIFF
SHADRACK KIPTARBEI KIYAI 9TH PLAINTIFF
SHADRACK KIPTARBEI KIYAI 10TH PLAINTIFF
VINCENT KIPKINYOR KIAY 11TH PLAINTIFF
VINCENT KIPKINYOR KIAY 12TH PLAINTIFF

AND

MOSES KIPYEGO KIYAI 1ST DEFENDANT
MOSES KIPYEGO KIYAI 2ND DEFENDANT
MOSES KIPYEGO KIYAI 3RD DEFENDANT
VINCENT KIPKINYOR KIYAI 4TH DEFENDANT
VINCENT KIPKINYOR KIYAI 5TH DEFENDANT



WESLEY CHERUIYOT KIYAI 6TH DEFENDANT
WESLEY CHERUIYOT KIYAI 7TH DEFENDANT
MOSES KIPYEGO KIAYI 8TH DEFENDANT
MOSES KIPYEGO KIAYI 9TH DEFENDANT

AND

MOSES KIPYEGO KIYAI PLAINTIFF
SHADRACK KIPTARBEI KIYAI PLAINTIFF

AND

VINCENT KIPKINYOR KIYAI DEFENDANT
WESLEY CHERUIYOT KIYAI DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 32 OF 2021

BETWEEN

VINCENT KIPKINYOR KIAY PLAINTIFF

AND

MOSES KIPYEGO KIAYI DEFENDANT

JUDGMENT

1. This judgment relates to two suits that were consolidated pursuant to an application dated 11th October 2021. No replying affidavit in opposition to the application for consolidation was filed and the application being unopposed was allowed on 25.01.2022 consolidating Kapsabet ELC No 32/2021 between Vincent Kiay Kipkinyor vs Moses Kiay Kipyego and this matter being Kapsabet ELC Case No 42/2021 between Vincent Kipkinyor Kiay and Wesley Cheruiyot Kiyai, vs Moses Kipyego Kiyai.
2. Upon the issuance of the order for consolidation the Plaintiffs were directed to file and serve their Amended Plaintiff, within 21 days and the Defendant were to file their amended defence within 14 days after service of the amended plaintiff.
3. Thereafter as the parties to the dispute were blood brothers the matter was referred to the Court Annexed Mediation, as the first port of call to try and settle the same, whence Mediation failed and the matter come up for directions on the hearing.
4. In the meantime, the Plaintiff did not file the Amended Plaintiff and their Advocate Mr. Arap Mitey did not attend Court for this matter on the numerous occasions it was mentioned. There was no compliance with the directions of filing of the amended plaintiff by the Plaintiff. The Defendants filed an Amended Defence and a Counterclaim, and on the hearing date was given in the presence of Mr. Tallam who held brief for Mr. Mitey for the Plaintiff on 6/12/2022, on one of the occasions the matter was mentioned.



5. The Plaintiff having not filed an Amended Plaintiff pursuant to the consolidation and being absent on the hearing date, on the application by Mr. Choge for the Defendants in the original suit and Plaintiffs in the counterclaim, the original Plaintiff's suit was dismissed for non-attendance, and the matter proceed for hearing of the counterclaim.
6. It is also worthwhile to note that the counterclaim proceeded undefended as no reply to defence and defence to counterclaim was filed by the Plaintiffs.
7. In view of the above and the fact that the counterclaim proceeded undefended the original Defendants are now the Plaintiffs in the counterclaim, and the original Plaintiff are the Defendants.

Plaintiff In The Counterclaim's Case: -

8. In the counterclaim, the Plaintiffs therein pleaded as follows,

That the 1st Plaintiff in the counterclaim Moses Kipyego Kiyai is the occupier and user of all that parcel of land known as Nandi/Kaptel/415 and had grown tea thereon and was entitled to the same, even though the same was registered in name of the 1ST Defendant in the counterclaim Vincent Kipkinyor Kiyai.
9. The 1st Plaintiff in the counterclaim also claimed occupation, possession and use of Nandi/Kaptel/415 to the exclusion of the 1st Defendant having occupied the same for more than 12 years. The said occupation and user being open, notorious, exclusive and adverse to the Defendant.
10. Both Plaintiffs in the counterclaim further pleaded that Nandi/Kaptel/2009 was to be shared among the 4 brothers in areas of 2.0 acre in favour of 2nd Plaintiff in the counterclaim. (Shadrack) 4.0 acres to the 1st Defendant in the counterclaim, Victor 8.0 acres to Moses and remainder to Wesley Kiayi, as had been previously shared their late father Kiyai Marus, and had been captured in a survey report ordered pursuant to a Court order, showing how of the brother lived.
11. The Plaintiffs in the counter claim thus sought for an order of declaration, finding and determination that the 1st Plaintiff in the original suit is holding Nandi/Kaptel/415 in trust for the 1st Plaintiff in the counterclaim and that the 1st Plaintiff in the counterclaim is entitled to the whole of the same and ought to be transferred, to Moses the 1st Plaintiff in the counterclaim.
12. An order for permanent injunction restraining the Plaintiffs in the original suit whether by themselves, servant, agents, nominees or whomsoever claiming through him and utilizing of parcel Nandi/Kaptel/415.
13. PW1, in the case was Shadrack Kiptarbei (Kiyai) who was the 2nd Plaintiff in the counterclaim, but was not an original Defendant in the suit. It was his testimony that Vincent Kiyai, the Original Plaintiff and now 1st Defendant in the counterclaim was his brother whom they shared the same father but each had his mother. He stated that Vincent, Moses and Wesley were brothers from the same mother. It was the Plaintiffs testimony that he lived in the homestead with his brother, and his house was erected in Nandi/Kaptel/2008. While Moses And Wesley Houses Were In Nandi/Kaptel/2009. The 1st Defendant In The Counterclaim Vincent Had Constructed And Lives In Nandi/Kaptel/317 But Was Entitled To 4 Acres Within Nandi/Kaptel/2009.
14. He testified that his stepbrother Moses utilized Nandi/Kaptel/415 Which Is About 10 Acres Exclusively. While Nandi/Kaptel/2008 Belonged To Him Was 25 Acres. Nandi/Kaptel/2009 Was Equally 25 Acres, Out Of Which Vincent Had Been Gifted 4 Acres In Nandi/Kaptel/2009, While He, Shadrack, Had Been Gifted 2 Acres, In Nandi/Kaptel/2009, Wesley had been given 8acres and the



- balance was to remain with Moses. The property was registered in the name of Vincent and Wesley but had been purchased by their father from the dowry of their sister.
15. It was his further testimony that Nandi/Kaptel/2009 Was A Subdivision Of Nandi/Kaptel/292. Nandi/Kaptel/2009 Was Registered In The Name Of Vincent And Wesley But As Trustees, For The 4 Brothers, Since They Were Minors At Time Of Registration. Vincent And Wesley Were To Share To Them. In Nandi/Kaptel/2009, Vincent Had Been Given 4 Acres, In Nandi/Kaptel/317 He Was Given 14 Acres And 16 Acres In Nandi/Kaptel/414.
 16. In Nandi/Kaptel/2009, Shadrack Was Given 2 Acres And In Nandi/Kaptel/2008 The Shadrack Had 10 Acres. While Wesley Had 8 Acres In Nandi/Kaptel/2009. Moses Has 11 Acres In Nandi/Kaptel/2009 And 10 Acres In Nandi/Kaptel/415. The Land Was Gifted To Them By Their Father On How Each Occupied. Nandi/Kaptel/415 had been given wholly to Moses, but was registered in the name of Vincent as Moses was a minor at the time of registration.
 17. Wesley's wife lived on the property. The properties did not belong to Vincent and Wesley although they were registered as the owner so as to subdivide to the rest of the 4 brothers.
 18. The witness produced a copy of his identity card as P Exhibit 1, copy of survey report as P Exhibit 2. Copy of Official Search for Nandi/Kaptel/415 As P Exhibit 3 Transfer For Nandi/Kaptel/415 As P Exhibit 4 Consent To Subdivide Nandi/Kaptel/2009 P Exhibit 5. Consent For The Survey Recorded In Court As P Exhibit 6. Search For Nandi/Kaptel/2008 P Exhibit 7, Search For Nandi/Kaptel 2009 As P Exhibit 8, And Search For Nandi/Kaptel/292 as P Exhibit 9.
 19. He prayed that Nandi/Kaptel/2009 Be Subdivided In Accordance To The Survey Report And Consent Produced In Court, While Nandi/Kaptel/415 be given wholly to Moses.
 20. PW2, Stella Chebet Chepkwony testified. It was her testimony that she is the spouse of Moses Kipyego Kiyai who was based in the United States. It was her testimony that she has lived in her matrimonial home in Nandi/Kaptel/2009 from 1998 when she was married. It was testimony that Shadrack, Wesley and Vincent were her brothers in law. It was her testimony that she was also using Nandi/Kaptel/415 exclusively although the same was registered in the name of her brother in law Vincent Kiyai who was yet to transfer it to her husband. She had grown tea bushes therein. When the property Nandi/Kaptel/415 was registered in 1974, her husband Moses was 12 years old as he was born in 1962. She produced a copy of Moses' identity card as P Exhibit 10, thus Vincent was registered as owner but in trust for Moses since Moses was a minor. She produced tea slips in her name from KTDA for payments of tea for the years 2012, 2013, 2014 and 2015, as P Exhibit 11 in respect of tea grown by her in Nandi/Kaptel/415. She stated that there was an attempt to subdivide 415 but it wasn't subdivided. She further stated that Nandi/Kaptel 2009 ought to subdivide in the portions that we are living on and she prayed that Nandi/Kaptel/415 be transferred to her husband's name.
 21. PW3, Moses Kipyego Kiyai testified via video link from Minnesota USA. It was his testimony that the Vincent, Shadrack and Wesley were his brothers, and that he had built in is Nandi/Kaptel/2009 But He Exclusively Utilized Nandi/Kaptel/415, which was his property but Vincent was registered in Trust for him. In Nandi/Kaptel/415, where he had planted tea which were harvested by his wife Stella Chebet (PW2).
 22. He produced the tea receipts from KTDA from 2022 – 2023 as P Exhibit 12. He prayed that the title in respect of Nandi/Kaptel/415 Be Transferred To Him And That Nandi/Kaptel/2009 to be partitioned and/or subdivided as per survey plan as was originally intended.
 23. As the Counterclaim was not defended, the Plaintiff case as well as the defence case were closed and the plaintiff was directed to file written submissions on the matter.



Plaintiff's Submissions: -

24. The Plaintiff submits on issues as follows; adverse possession in relation to the suit property, and that the 1st Plaintiff in the counterclaim has proven the ingredients of adverse possession and the same should be allowed. In relation to Nandi/Kaptel/2009 the Plaintiff submitted that they had proved Trust and the same ought to be subdivided as per survey plan.

Issues For Determination: -

25. From the counterclaim as pleaded, the evidence on record and the submissions, the Court frames the following as issues for determination;
- i. Whether or not the 1st Plaintiff in the counterclaim has proven the ingredients of adverse possession in respect of Nandi/Kaptel/415.
 - ii. Whether or not the 1st Plaintiff in the counterclaim has proven trust in respect of registration of Nandi/Kaptel/415 and whether both Plaintiffs in the counterclaim have proven trust in respect of Nandi/Kaptel/2009.
 - iii. Whether the Plaintiffs are entitled to the reliefs sought in the counterclaims.
 - iv. Who bears the costs of the suit?

Analysis And Determination: -

26. As noted earlier in the Judgment, this matter proceeded for hearing of the counterclaim, the original suit having been dismissed for non-attendance, and there being no amended plaint pursuant to the order for consolidation. The original Plaintiff became the Defendants in the counterclaim and they did not file a defence to the counterclaim either, hence the counterclaim proceeded as undefended.
27. Even though the counterclaim proceeded as undefended, the Plaintiff in the counterclaim, nonetheless have to satisfy the Court, that the uncontroverted evidence aid then in discharging the burden of proof, and that they are entitled to the grant of the prayers sought in the counterclaim; as was held in the case of *Karugi and others vs Kabiya & 3 others* 1983 eKLR where the Court of Appeal observed;
- “The burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge when the matter is not validly defended. The burden of proof is no way lessened because this is heard by way of formal proof.”
28. Before dealing with the issues for determination, the Court will look out the uncontroverted facts, in this matter.
29. The first is that all the parties herein are close relatives by virtue of them being 3 blood brother and a step brother. Vincent Kiyai, Moses Kiyai and Wesley Kiyai being blood brothers while Shadrack Kiyai is a step brother.
30. With regard to close relatives as in this case, the Courts have held previously that adverse possession between close relatives is not permissible and that is the settled law.



31. The Court of Appeal in the decision in *Samuel Kihamba vs Mary Mbaisi* 2015 (eKLR) held as follows:-

“Could the doctrine of adverse possession apply against the parties to the suit before the learned judge who were related by being mother and stepson? We think not, we are persuaded by various dicta, which we have quoted and relied upon in this judgment and must state, it would create havoc for families and society in Kenya generally if the principle of adverse possession applied within families against close relatives.”

32. The High Court in *Gedion Mbui vs Mukindia Maranya* 1993 (eKLR) as well as *Rodgers Mwabonyi vs Gedion Mwabonje* (2014) eKLR declined to grant adverse possession between relative’s possession even before the decision in the Samuel Kihamba, and that being the settled law, the Court thus declines to grant adverse possession noting that the parties from the pleadings and evidence are the brothers hence issue number 1 answered in the negative.

33. Issue number 2, as to whether Moses Kiyai has proved that Vincent Kiyai was registered as trustee for him in respect of Nandi/Kaptel/415; and the other related issue as to whether Vincent Kiyai and Wesley Kiyai were registered as trustee for the 4 brothers in respect of Nandi/Kaptel/2009.

34. PW1, Shadrack Kiyai, a step brother of both Vincent Kiyai and Moses Kiyai, testified and indicated that Vincent Kiyai was registered as proprietor of Nandi/Kaptel/415 as trustee for Moses Kiyai, who was a Minor at the time of registration.

35. PW2, Stella Cheruiyot Moses Kiyai’s wife corroborated the evidence and stated that during the registration, Mr. Moses Kiyai was 12 years old and could not have been registered as proprietor, hence the registration of Vincent as proprietor.

36. The testimony of PW3 also corroborates the same. A copy of the identification card of Moses Kiyai produced in evidence as P Exhibit 10 places the date of birth of Moses as 1962. The transfer to Vincent Kiyai, produced as P Exhibit 4 was effected on 9th October 1974. The witnesses further testified that Moses Kiyai and his wife were utilizing Nandi/Kaptel/415 for tea farming and receipts from KTDA in the name of PW2, Moses Kiyai’s wife were produced as P Exhibit 11 and 12 a – b.

The possession and utilization of Nandi/Kaptel/415 is by Moses Kiyai, his wife and his family.

37. The Plaintiff in counterclaim has pleaded trust, but did not specify the particulars trust they placed reliance on. The evidence show that Vincent Kiyai was registered on behalf of Moses Kiyai who was a minor, as the property was purchased by their late father.

38. The Court of Appeal in the decision in the cases of *Twalib Hatayan and Another vs Siad Sagger Ahmed at heidy and another* (2015) eKLR as well as *Mark Kiprotich Sirma vs Sosten Kiplagat Singoei* (2022) KECA 708 discussed the various trusts that exist.

39. In the Twalib Hatayan case, the Court of Appeal defined a constructive case and a resulting trust as follows:-

“a constructive trust is an equitable remedy imposed by the Court against one who has already acquired property by wrong doing.....while a resulting trust a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggests that the transferor did not intend to confer a beneficial interest upon the transferee.”



40. The 1st Plaintiffs in the counterclaim have pleaded Trust in relation to Nandi/Kaptel/415 this being no express trust, the Court has power to imply a trust as was held Court of Appeal in the case of *Peter Ndungu Njenga vs Sophia Watiri Ndugu*.
41. The circumstances and evidence in this case the clear intention was Vincent was registered as an owner for the benefit of Moses Kiyai who was a minor. The trust that the Court implies in this circumstances of this case is the resulting trust as opposed to the constructive trust
42. The Court thus finds the 1st Plaintiff has proved entitlement to registration as proprietor of Nandi/Kaptel/415 by virtue of resulting trust.
43. With regard to Nandi/Kaptel/2009. The Pw1 Indicated That Nandi/Kaptel/2009 was a subdivision of Nandi/Kaptel/292 And A Copy Of Register Of Nandi/Kaptel/292 produced as P Exhibit 9 confirms the same.

Entry number 3 of P Exhibit 9 shows registration of Vincent Kiayi and Wesley Cheruiyot Kiyai pursuant to succession cause No 97/2005, and at entry number 4 shows subdivision to Nandi/Kaptel/2008 and 2009 and all the 4 brothers are named in entry No 3.

44. PW1 indicated that pursuant to the said subdivision of Nandi/Kaptel/292 he owned Nandi/Kaptel/2008 and produced a copy of search for Nandi/Kaptel/2008 As P Exhibit 7 And A Copy Of Nandi/Kaptel/2009 Showing That It Was Registered In The Names Of Wesley Kiyai And Vincent Kiyai. It Was The Plaintiff's Testimony That The 4 Brothers Had Agreed On The Subdivision Of Parcel Number Nandi/Kaptel/2009 into 4 portions and had applied for LCB consent and obtained the consent in 2018 and the same was produced as P Exhibit 8 but that the Defendants in the counterclaim Vincent Kiyai and Wesley Kiyai had refused to effect transfer hence the counterclaim.
45. And that pursuant to a consent order a survey was conducted on their occupation and a survey report as well as the consent order were produced as P Exhibit 2 and P Exhibit 6 respectively. The survey report indicated the acreages occupied by each party as here follows;
Vincent Kiayi - 1.57 Ha
Moses Kiayi - 4.8 Ha
Wesley Kiayi - 3.27 Ha
Shadrack Kiayi - 0.84 Ha
46. PW1 had indicated in his testimony that Vincent Kiayi was entitled to 4 acres, Wesley had 8 acres, Moses 11 acres and Shadrack 2 acres.
47. The acreages tally with the survey report and there is absolutely no reason why Vincent Kiyai and Wesley Kiyai having initiated the process of subdivision obtaining Land Control Board, consents would thereafter refuse to proceed.
48. The Court finds that in respect of Nandi/Kaptel/2009, There Exists An Express Trust Captured In Entry 3 Of Green Card Of Nandi/Kaptel/292 (p Exhibit 9) And Succession Cause No 97/2005 Captured Therein; In That Vincent Kiyai And Wesley Kiyai Were Registered As Owners Upon Subdivision Of Nandi/Kaptel/292 for the benefit of themselves, Moses Kiyai and Shadrack Kiyai in the portion they occupy as in the survey report as captured in P Exhibit 8 and 9. The Plaintiff's in the counterclaim's claim for Trust though not expressly pleaded is thus founded on Section 20 (2) of the Limitation of Actions Act.



Disposition: -

The Court enters judgement for the Plaintiffs in the counterclaim in terms that;

- i. The Court finds that the 1st Plaintiff Moses Kiyai has proven entitlement to the whole of Nandi/Kaptel/415 by virtue of a resulting Trust and the Vincent Kiyai to transfer the same to the 1st Plaintiff (Moses Kipyego Kiyai) within 30 days of the judgment in default the Deputy Registrar of the Court to execute all the documents necessary to effect the transfer.
- ii. Both Plaintiffs in the counterclaim have proved entitlement to portions they occupy in land parcel Nandi/Kaptel/2009 in terms of the survey report dated 9/5/2018, by virtue of an Express Trust and Vincent Kiyai and Wesley Kiyai to effect transfer to the Moses Kiyai and Shadrack Kiyai as per the survey report dated 9th May 2018, within 30 days of judgment in default the Deputy Registrar of the Court to execute all the necessary documents to effect the subdivisions and transfers to the Plaintiffs in the counterclaim.
- iii. Ordinarily the Court would have ordered no order as to costs, the Plaintiff in the counterclaim and Defendants being brothers, but in this case, the Plaintiffs in the counterclaim shall have both costs of the suit and counterclaim.

DELIVERED AND DATED AT KAPSABET THIS 15TH DAY OF JUNE, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Choge for Plaintiffs in the counterclaim

No appearance for Defendants.

