



REPUBLIC OF KENYA



**Kiprono v Chebiator (Environment & Land Case 73 of 2016)  
[2023] KEELC 18649 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18649 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 73 OF 2016**

**EO OBAGA, J**

**JULY 13, 2023**

**BETWEEN**

**FREDRICK KIMUTAI KIPRONO ..... PLAINTIFF**

**AND**

**JOHN KANGOGO CHEBIATOR ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint filed on 4/4/2016, the Plaintiff sought the following reliefs from the Defendant: -
  - a. A permanent injunction restraining the Defendants, his agents and/or servants from entering, trespassing, encroaching, ploughing or planting in any manner with that parcel of land known as Uasin Gishu/Illula/277.
  - b. Costs of the suit.
  - c. Any other or further relief that tis honourable court may deem just and fit to grant.
2. The Defendant filed a defence and counter-claim in which he sought the following reliefs from the Plaintiff: -
  - a. The Plaintiff's suit against the Defendant/Claimant be dismissed with costs.
  - b. A declaration that the counter claimant is the absolute owner of 2 acres to be excised from land parcel known as Uasin Gishu/Illula /277 through adverse possession.
  - c. An order compelling the PAlintiff to execute all necessary documents including survey to vest into the counter-claimant 2 acres from land parcel Uasin Gishu/Illula/277.



- d. Permanent injunction orders restraining the plaintiff and/or his agents and/or servants from interfering with the Plaintiff's ownership of the suit parcel of land.
- e. Costs of the counter-claim.
- f. Further and/or any other relief this court may deem fit and just to grant in the circumstances.

### **Background ;**

3. The Plaintiff is the administrator of the Estate of his late mother Esther Talai Tallam (Deceased) who was the registered owner of LR No Uasin Gishu/Illula/277 (suit property) measuring 5 acres. During the lifetime of the Deceased, she sold 2 acres to Julius Kiptoo Arusei. As the suit property had an outstanding loan, the Deceased gave the remainder of the 3 acres to Julius Kiptoo Arusei to cultivate for five years to offset the outstanding loan.
4. The Deceased died on November 30, 1992 when the Plaintiff and his siblings were young and in school. When the plaintiff became of age, he took out grant of letters of administration in respect of the Estate of the Deceased on 17/7/2014. The grant was subsequently confirmed on 22/6/2017.
5. Prior to the Plaintiff obtaining grant of letters of administration, his family sought to know whether Julius Kiptoo Arusei had offset the loan due to the Settlement Fund Trustee (SFT). It was discovered that as at 2003, there was an outstanding loan of 17,476/=. When Julius Kiptoo Arusei was asked why he was not offsetting the loan to SFT, he told the Plaintiff's family that the Defendant had purchased two acres from Alesus Kipkogei Rotich. The family then tried to resolve the contentious sale of two acres through meetings with elders but it proved difficult as each time a meeting was held, it was disrupted by the Defendant.
6. It was further discovered that the original title to the suit property was in possession of the Defendant. The Defendant was summoned by Police and he surrendered the title to the Plaintiff's family. This is what prompted the filing of the present suit in 2016.

### **Plaintiff's Case ;**

7. The Plaintiff's case is that the Deceased did not sell any land to Alesus Kipkogei Rotich which he would have sold to the Defendant. The Plaintiff testified that on 4/9/2003, there was a meeting held in which Alesus Kipkogei Rotich was asked to bring a sale agreement between him and the Deceased. He said the agreement was lost. He was given time to vail the same. Alesus Kipkogei Rotich kept promising to look for the lost agreement between him and the Deceased but he never availed it.
8. The Plaintiff testified that there is a time they fenced off the three acres belonging to the Deceased but the Defendant destroyed the fence.

### **Defendant's Case;**

9. The Defendant's case is that he purchased 2 acres from Alesus Kipkogei Rotich on 7/3/1995 at Kshs 110,000/= The agreement was prepared by Birech & Co. Advocates. He took possession and has been cultivating the same since then. The Defendant testified that in 2007 during the post-election violence, the wife of Julius Kiptoo Arusei gave him the original title to the suit property for safe keeping.
10. The Defendant later surrendered the title to Eldoret Police station. In 2013, the Plaintiff's family wanted to evict him from the suit property but they could not succeed. He stated that he was not given the sale agreement between Alesus Kipkogei Rotch and the Deceased as the same was said to be lost.



## Analysis and Determination;

11. The Plaintiff filed his submissions on 17/4/2023. The Defendant filed his submissions on 9/5/2023. The Plaintiff submitted that he had demonstrated that there was no sale between the Deceased and Alesus Kipkogei Rotich who allegedly sold 2 acres to the Defendant. The Plaintiff further submitted that the said Alesus Kipkogei Rotich was given time to avail the alleged agreement between him and the Deceased but he failed to do so.
12. The Plaintiff further submitted that the Police abstract which was obtained by Alesus Kipkogei in 2015 was made purposely for this case as he did not produce it during the various times he appeared before the elders and before the chief. He submitted that if he had the Police abstract, he would have simply produced it as a confirmation that he had lost the agreement. Instead he kept on seeking for more time.
13. On the Defendant's claim that he had acquired the 2 acres by way of adverse possession, the Plaintiff submitted that the Defendant's stay on the land was not peaceful as demonstrated by the various meetings which were held in which the Defendant turned violent. The Defendant even destroyed the barbed wire fence which the Plaintiff had put to secure the land. The Plaintiff relied on the case of *Gitbu v Ndeete* (1984) KLR 776 where it was held 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 effective entry into land, giving notice to quit cannot be effective assertion of right for purpose of stopping the running of time under the *Limitation of Actions Act*.”

14. On his part, the Defendant stated that he has been in peaceful occupation of the 2 acres since 1995 when he purchased the same from Alesus Kipkogei Rotich. He relied on the case of Kisumu Civil Appeal No 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR where it was stated as follows: -
  - a. On what date he came into possession;
  - b. What was the nature of his possession;
  - c. Whether the fact of his possession was known to the other party;
  - d. For how long his possession has continued and;
  - e. That the possession was open and undisturbed for the requisite 12 years.

15. The Defendant also relied on the case of *Wambugu v Njuguna* (1983) KLR 173 where it was stated as follows: -

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is; the claimant's possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”

16. Having considered the evidence adduced by the parties, and their submissions and the cases relied on, the following issues emerge for determination. The first is whether there was a sale agreement of 2 acres between the Deceased and Alesus Kipkogei Rotich. The second is whether Alesus Kipkogei had any



land which he could pass on to the Defendant. The third is whether the Defendant has acquired 2 acres out of the suit property through adverse possession. The fourth is whether the Plaintiff and the Defendant are entitled to the reliefs in their respective claims. The last issue is which order is to be made on costs.

**Whether there was sale of 2 acres between the Deceased and Alesus Kipkogei Rotich;**

17. Alesus Kipkogei Rotich testified that he purchased 2 acres from the Deceased in 1992. He stated that he paid Kshs 45,000/= and that the agreement was prepared in the firm of Agarwai & Co. Advocates. He stated that the agreement was lost and that he swore an affidavit to that effect.
18. Whereas in his evidence in chief, Alesus Kipkogei stated that he purchased the 2 acres in 1992, in the affidavit which he swore on 31/3/2015, he stated that he purchased the 2 acres in 1990. He did not produce a copy of the said agreement or any evidence of payment of Kshs 45,000/=
19. Alesus Kipkogei Rotich did not attempt to bring any evidence of a counterpart of the agreement which was allegedly prepared by the firm of Agarwai & Co. Advocates. I am aware that Mr. Agarwai died but what I am not sure is whether he was a sole practitioner and if his firm was wound up.
20. Alesus Kipkogei Rotich attended meetings before the elders and the chief. He was asked to bring the alleged agreement between him and the deceased. He sought for time to bring the agreement but never did so. He instead came up with an affidavit which contradicts his own evidence in chief.
21. During the objection proceedings in Eldoret, HC Succession Cause No 96 of 2014, the Police abstract which was mentioned in Alesus Kipkogei Rotich's affidavit was not annexed. This Police abstract was belatedly introduced in those proceedings on 7/10/2020 when the Defendant's counsel sought leave to file a supplementary list of documents to introduce it. If the Police abstract was indeed there, he would have not sought for time to go and look for it during the elders meeting which was convened on 16/4/2015. The Police abstract is dated 31/3/2015. It is therefore clear that the Police abstract was manufactured in preparation of this case.
22. Esther Talai Tallam died on December 30, 1992. Alesus claims that it is in the same year that he purchased the two acres. There is no agreement produced. In the circumstances, I find that Alesus Kipkogei Rotich did not purchase the 2 acres from the deceased as he alleged.

**Whether Alesus Kipkogei Rotich had any land which he could pass on to the Defendant;**

23. While dealing with the first issue hereinabove, I have demonstrated that Alesus Kipkogei Rotich did not purchase any land from the Deceased. Alesus Kipkogei Rotich was called as a defence witness DW3. He claimed that he had purchased 2 acres from the Deceased in 1992 and sold the 2 acres to the Defendant on 7/3/1995. The sale agreement was produced as defence exhibit 5. Even if the agreement of 7/3/1995 was genuine, Alesus Kipkogei Rotich had no land to sell to the Defendant. the Defendant himself admitted that Alesus Kipkogei Rotich did not give him any agreement between him and the Deceased. I therefore find that Alesus Kipkogei Rotich had no any interest capable of being passed to the Defendant.

**Whether the Defendant has acquired 2 acres out of the suit property by way of adverse possession;**

24. There is no doubt that the Defendant entered the two acres in 1995 following the purchase from Alesus Kipkogei Rotich. As was sated in the case of *Richard Wefwafwa Songoi (supra)* the entry to the Land must be open and undisturbed for the requisite 12 years. In the instant case, there is evidence that as early as 4/9/2003 the Plaintiff had started demanding back their 2 acres. An elders meeting was convened wherein the Defendant was asked to avail Alesus Kipkogei Rotich and the agreement



between him (Alesus Kipkoge Rotich) and the Deceased. Though the Defendant was present, he did not sign the minutes. DW6 was present during the meeting of 4/9/2003. Though he had initially claimed that he never participated in any meetings where the issue of the 2 acres arose, when he was shown the minutes, he conceded that he was present. Infact he was one of the elders present and who signed the minutes. This meeting occurred before the expiry of 12 years.

25. There were subsequent meetings held where elders were present. There was another meeting convened by the chief. The minutes before the chief of Kapsoya were produced as plaintiff exhibit 7. There is a time the Plaintiff entered the 2 acres and fenced off the same. The Defendant came and destroyed the barbed wire fence. The Defendant has never enjoyed peaceful stay on the 2 acres.
26. The defendant has not proved that he has used the land as of right; nec vi, nec clam, nec precario that is to say no force, no secrecy, and no permission (see the case of *Kimani Ruchira v Swift Rutherford & Co. Ltd* (1980) KLR.
27. In the instant case, the Defendant has remained on the 2 acres by force. He has been repulsing the Plaintiff wherever he attempts to take possession. He cannot therefore be said to have acquired the 2 acres by way of adverse possession. The true owner has not been dispossessed of his title.
28. DW5 Samuel Kibiego Sang claimed that the Defendant has been staying on the 2 acres peacefully from 1995 until 2015 when a dispute arose. He claimed that prior to 2015, there were no disputes over the 2 acres. He became a village elder in 2010. As early as 2003, there were disputes over the 2 acres. His evidence is therefore not true.
29. DW2 Josphine Chemutai Arusei is the wife of Julius Kiptoo Arusei who had purchased 2 acres from the Deceased in 1989. She claimed that her husband purchased 3 acres and that the Defendant is the one who built a house on the 2 acres and that he has been staying peacefully on the land until 2016 when the plaintiff started claiming that the 2 acres were not purchased lawfully. This witness was lying on oath. Her late husband only purchased 2 acres. Contrary to her allegations that disputes started in 2015, there is evidence that disputes started as early as 2003. During cross examination, the Defendant conceded that the Plaintiff and his siblings went to the 2 acres in 1996, 1998, 2003 and 2014 but they were chased away. He even conceded that he is not the one who built the houses on the 2 acres.

### **Disposition;**

30. From the above analysis, it is clear that the Plaintiff has proved that the Defendant is a trespasser on the 2 acres. I therefore find that the plaintiff has proved his case on a balance of probabilities. I allow the Plaintiff's claim in terms of prayers (a) and (b) of the plaint dated and filed on April 4, 2016. On the other hand, I find that the Defendant has failed to prove his counter-claim. The counter-claim is dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Kibii for Plaintiff.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

