



**Kimitei v Kiprotich & 2 others (Environment and Land Appeal
E013 of 2022) [2023] KEELC 20241 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E013 OF 2022
L WAITHAKA, J
SEPTEMBER 28, 2023**

BETWEEN

WILLIAM CHEBOI KIMITEI APPELLANT

AND

AGNES KIPROTICH 1ST RESPONDENT

MARIA MORICE 2ND RESPONDENT

EDWIN KIPLAGAT 3RD RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. C. A. Kutwa –
SPM delivered on 17th August, 2022 in Iten SPM ELC. No.E002 of 2020)*

JUDGMENT

Introduction.

1. By a Plaint dated 31st August 2020, and filed on 18th September 2020, the appellant herein instituted a suit in the lower court to wit Iten SPMC ELC Case No.E2 of 2020 seeking judgment against the respondents for an order of permanent injunction to restrain the defendants (now respondents) by themselves, their servants and/or agents from claiming, trespassing, occupying and/or in any other way interfering with the property known as Irong/Korkitony/14 (the suit property); a declaration that the suit property rightfully belongs to the him; costs of the suit; any further or other relief which the court may deem fit and just to grant.
2. The suit was premised on the ground that the plaintiff (now appellant) was at all times material and relevant to the suit the registered owner of the suit property; that the defendants had encroached into the suit property and claimed joint ownership of the suit property; that attempts to get the defendants vacate the suit property were futile.



3. The defendants filed a joint statement of defence and counterclaim, dated 11th May, 2021. In the statement of defence, the defendants denied the plaintiff's contention that he was at all times material to the suit the registered owner of the suit property and contended if at all the plaintiff was the registered proprietor of the suit property, then his registration as the proprietor of the suit property was done illegally, unprocedurally and through a corrupt scheme. Vide paragraph 4 of the statement of defence, the defendants pleaded that they had been in use and occupation of the suit property, since 1960. The defendants further contend that the issue of ownership of the suit property was resolved by elders.
4. In the counterclaim, the defendants have reiterated the averments contained in their statement of defence and contended that they have acquired ownership to the suit property by virtue of having been in adverse possession thereof. By way of counterclaim, the defendants sought judgment against the plaintiff for a declaration that they (the defendants) have acquired the rights of an adverse possessor over the suit property and that the title of the plaintiff with respect to the suit property had been extinguished by operation of the law of adverse possession; an order for their registration as the proprietors of the respective portions of the suit property they have been in occupation of; costs of the counterclaim and interest thereon; any other or further relief that the honourable court may deem fit and expedient for the ends of justice.
5. The plaintiff filed a reply to the defendants' statement of defence and counterclaim, dated 31st August, 2021 reiterating the averments in his plaint and denying the defendants contention that they have enjoyed quiet and peaceful use and occupation of the suit property since 1960. The plaintiff also denied the defendants' contention that he obtained the suit property illegally.
6. Arguing that adverse possession is inapplicable to the suit property, the plaintiff urged the court to dismiss the defendants' defence and counterclaim with costs to him and to enter judgment in his favour as sought in the plaint.
7. When the case came up for hearing, the plaintiff availed three (3) witnesses, himself included. The defendants called four witnesses.
8. The plaintiff produced the documents listed in his list of documents filed on 18th September 2020, as Pexbt 1 to 5 after they were admitted in evidence. These are:-copy of title deed issued on 7th December 1971; copy of certificate of official search dated 7th November 2019; copy of demand letter dated 26th March 2019; copy of chief's letter dated 18th January 2018 and copy of minutes for a meeting held on 8th September, 1965.
9. The defendants on the other hand, produced the documents contained in their list of documents filed on 2nd March 2022, after they were admitted in evidence as Dexbt 1 to 5. These are:- copy of burial permit serial number 908670; copy of certificate of death serial No.0409586; copy of certificate of death Serial No.113625; copies of photographs of graveyards; copies of photographs of homestead.
10. Upon considering the case presented before him and the evidence tendered in respect thereof, the Learned Trial Magistrate (TM) dismissed the plaintiff's case and entered judgment in favour of the defendants as sought in the counterclaim.
11. Dissatisfied with the decision of the Learned TM, the plaintiff appealed to this court on four (4) grounds which can be reduced into one broad ground namely the Learned TM erred by dismissing his case and by accepting the defendants' defence and allowing the defendants counterclaim.
12. Pursuant to directions issued on 22nd March 2023, that the Appeal be disposed off by way of written submissions; the parties to the Appeal filed submissions which I have read and considered.



Analysis and determination

13. As pointed out above, the appellant instituted this suit seeking to evict the defendants' from the suit property and upon eviction, to permanently restrain them from entering the suit property.
14. From the evidence adduced in this case, it is common ground that the defendants had been in use and occupation of the suit property for a long period of time. That fact is acknowledged by the plaintiff and his witnesses in their oral testimony before court. The plaintiff acknowledged that they had cases with the defendants in the chief's office as early as 1990s. He also acknowledged that he does not live in the suit property. According to Joseph Kimeto (P.W.2), the defendants had been in occupation of the suit property since 1982. On his part, Hilary Kiplagat, (P.W.3), informed the court that the defendants had been in occupation of the suit property since 1984. The plaintiff and his witnesses acknowledged that the defendants have buried their relatives in the suit property.
15. Without leading evidence capable of showing that the defendants' entry into the suit property was with permission of the registered owner, the plaintiff, in his submissions filed on 24th May 2023, in support of the Appeal, faults the Learned TM for holding that the defendants had made a case for being declared the owners of the respective portions of the suit property they occupy without investigating how they entered into the suit property.
16. According to the plaintiff, the defendants did not prove that their use and occupation of the suit property was peaceful. The defendants are also said to have failed to prove their mode of entry into the suit property. The court is said to have made its decision on the assumption that the defendants' entry into the suit property was not permissible.
17. On their part, the respondents, through the submissions they filed on 19th May 2023, have submitted that the Learned TM's determination is fair, just, sound and proper. That determination is said to have been made after the trial magistrate evaluated the evidence and the law. The learned TM is said to have given reasons for his determination hence there is no basis for interference with his decision.
18. Terming the Appeal lacking in merits, the respondents urge the court to dismiss it with costs to them.
19. Having carefully reviewed the cases urged by the respective parties, the evidence tendered in respect thereof and the submissions by the respective parties, I do find as a fact that the defendants had stayed in the suit property for a long period of time to warrant their use and occupation of the suit property being declared an overriding interest in the title issued to the plaintiff on 19th March, 2019.
20. However, I do find the defendant's claim for adverse possession against the title held by the plaintiff to be unmaintainable for the simple reason that the title was issued in 2019 barely a year before the suit was filed.
21. To succeed in their claim for adverse possession, the defendants' ought to have premised their case against the title issued to the plaintiff's predecessor in entitlement to the suit property, one Kandie Arap Chemoiwa.
22. It is the view of this court that it is only after successfully demonstrating that the title held by the plaintiff's predecessor in entitlement to the suit property had been extinguished by their adverse possession of the property, that the defendants would be able to claim that registration of the plaintiff as the registered proprietor of the suit property is subject to a trust in their favour. The defendants having failed to acknowledge in their pleadings the title held by the plaintiff in respect of the suit property, cannot be heard to claim that they are entitled to urge a case for adverse possession premised on the plaintiffs' title.



23. Despite the foregoing observation, having determined that the respondents' occupation is an overriding interest to the title held by the plaintiff, I find and hold that the Appeal is lacking in merit and I dismiss it with costs to the respondents.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Ms Rop for the respondents

No appearance for the appellant

Christine – Court Assistant

