



**Lel & another v Creider (Environment & Land Case 105 of 2021)
[2023] KEELC 20227 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 105 OF 2021
MN MWANYALE, J
SEPTEMBER 25, 2023**

BETWEEN

RAYMOND LEL 1ST PLAINTIFF

CELLY JEPKOSGEI KORIR 2ND PLAINTIFF

AND

JANE TABSUBEI CREIDER DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 24th June 2020, the Applicants Raymond Lel and Celly Jepkosgei Korir sought determination of the following issues against Jane Tabsubei Creider in relation to their claim of adverse possession over Nandi/Chepterit/995.
2. The issues sought to be determined are;
 - a) whether the Plaintiffs have been in open, uninterrupted, occupation and without the consent of the Defendant over 1.0 Ha comprised in Land Parcel No. Nandi/Chepterit/995
 - b) whether the Plaintiffs occupation of the said parcel of land known as L.R. NO. Nandi/Chepterit/995 has been for a period of over 12 years?
 - c) Whether the Defendant title of the said piece of land known as L.R. No. Nandi/Chepterit/995 has been extinguished by the Applicant's diverse possession.
 - d) Whether the Respondent ought to convey the said parcel of land. L.R. NO. Nandi/Chepterit/995 to the Plaintiff's and in furtherance to convey the said portion of land to the Plaintiff's failure which the Deputy Registrar of the High Court or such other officer as the Court may designate the said instruments conveying the said parcel of land to the Applicants.
 - e) whether the Plaintiffs are entitled to costs of the suit.



3. The Applicant further seek upon determination of the above listed issues for reliefs as there follows;
 - i) a declaration be made that the Plaintiffs are in occupation of title no L. R. Nandi/Chepterit/995 for a period of over 12 years.
 - ii) a declaration be made that the Defendants title and rights to the said parcel of Land measuring 1.21 Ha thereof, be extinguished by way of adverse possession upon expiry of 12 years during the period the Applicant have been in peaceful, open, quiet and uninterrupted occupation having occupied for over 18 years.
 - iii) a declaration that upon the expiry of the said parcel of land in trust for Plaintiffs
 - iv) a declaration that the Respondents right over the suit parcel of land has been extinguished and that the Plaintiffs be registered as the rightful owners of the suit land which they have been occupying
 - v) That the Defendant be ordered to execute all documents of transfer in respect of the said parcel of land Nandi/Chepterit/995 failure to which the Deputy Registrar to the High Court do execute the said transfer forms.
 - vii) The Defendant be restrained by way of permanent injunction either by himself and/or servant and/or agent, assigns from alienating selling, transferring, encumbering, subdividing, leasing, wasting and/or in any other way from disposing off and/or otherwise dealing with the suit land known as Nandi/Chepterit/995 and be further restrained form inferring with the Applicants peaceful and quiet possession thereof.
4. Due to inaction of the parties upon transfer of the suit Kapsabet ELC from Eldoret ELC, the matter was listed for dismissal, which jolted the parties to action and directions were taken on 14/6/2023; where the Originating Summons dated 24/6/2020 was converted to a plaint, and the Replying Affidavit dated 24/7/2020 was converted to defence as well as a witness statement of the Defendant. The matter thus proceeded on viva voce evidence.
5. Pursuant to conversion of the Originating Summons to a plaint, and the Replying Affidavit to a Defence, the Applicants are now the Plaintiffs and the Respondent is the Defendant.

Plaintiff's Case And Evidence:

6. It the Plaintiff's case as captured in the supporting affidavit of Raymond Lel in support of the Originating Summons that;
 - i) The Plaintiffs moved into the suit property in 2002 and Defendant had notice of their occupation of the parcel.
 - ii) That they made improvements to a habitable standard since 2002, and they have been in occupation of the parcel and have undertaken cultivation of crops and reared dairy animals thereon without interruption.
7. They sank a borehole, therein, and the Defendant only showed up in 2012 where she harvested most of the mature trees. They had lived peaceful since 2002 and are thus entitled to claim the same by adverse possession.
8. Both Plaintiffs testified in the matter, the 1st Plaintiff as PW1 and the 2nd Plaintiff as PW2. It was PW1's evidence while adopting his witness statement that they had lived on the suit property since December 2000, and have built 6 houses thereon; fenced the property and sank a borehole. The title



of the property was in the name of Jane Tapsubelei Creider, the Defendant and he produced a copy of the title as P Exhibit 1 as well as the photographs as P Exhibits 2. It was the PW1's further evidence that the Defendant was his aunt, and she had given his father the title without an agreement whatsoever. In 2013, the Defendant had harvested trees on the suit property, and the Plaintiffs were given a Notice to vacate the premises in 2014.

9. That PW2 had signed an agreement indicating that she would vacate the property. The witnesses indicated that he had not filed another case in Eldoret, and that he had been on the property for over 20 years and requested the Court to allow the prayers in the plaint.
10. On cross – examination, PW1 stated that Celly Jepkosgei Korir the 2nd Plaintiff was her mother, her father was Reuben Kiplating (now deceased) who was a brother to the Defendant, his late father originally came from Masan in Aldai and he left there in December 2002.
11. His cousin Collins Creider came to the property more than 10 years ago, together with a Mr. Kiprono and harvested trees. PW1 stopped the cutting of trees and he was arrested, charged and fined kshs 3,000/= . The Defendant had offered his (PW1)'s dad a place to stay, there was no LCB consent no transfer.
12. On further cross – examination the witness stated that his case was joint with his mother's but he was not aware of the case between his mother and the Defendant. The witness conceded that the Defendant had purchased the property with an existing house thereon. He stated that he had no alternative place to go; and the Defendant and his Aunt had allowed them to stay on the property.
13. In re-examination, the witness stated that his aunt had bought the property on behalf of his late father. His late father had been buried at his (late father's) uncles farm in Wasan Aldai. He had not been evicted from the property and he was not aware of the Eldoret ELC No. 17/2014.
14. PW2, Celly Jepkosgei Korir, the 2nd Plaintiff testified and adopted her witness statement.
15. It was her evidence that she entered the suit property in 2002. The same had been purchased by the Defendant on behalf of her late husband, the Defendant had given her late husband the title to the property but the Defendant later took the title and issued them an eviction notice.
16. She testified that she had been forced to sign an agreement to give possession at the chief's office in the presence of the Chief and the Assistant Chief.
17. It was her further testimony that she did not know an Advocate by then name Maengwe and she had not filed suit that she had developed 6 houses on the property. She had bought the trees on the property from the previous owner which the Defendant, had sent a Mr. Kiprono to cut, and when her son opposed, he was taken to the police station. It was her plea to the Court to grant the property since the Defendant had misled them to live there on.
18. On cross – examination, the witness stated that she was forced to sign the agreement to give possession at the chief's office. She stated that she had entered the property in 2002, they were living in Aldai before she moved to the property.
19. Her husband was sick when she moved to the property and she later passed on. The Defendant is the one who moved them to suit property, since there was misunderstanding at the Aldai home. She cultivated on her daughter's property.
20. There was no Estate in respect of her father in law, as her mother in law lived with her brothers. She stated that she did not have any agreement for purchase of the trees.



21. She stated that Eldoret case was to prevent them from trespassing she confirmed that the Defendant was sister to her late husband thus her sister – in - law.
22. She further stated that she was not aware that the Defendant was out of the Country. When the title deed was processed. She was not aware that her late husband was the one processing the title on behalf of the Defendant.
23. In re-examination, she stated that it was Defendant who moved them from Aldai to Chepterit. She stated that she was aware of the Eldoret case which related to the same property; and that she could not more back to Aldai since she had moved out and she had not other place to go.
24. With the testimony of the two witnesses the Plaintiffs case closed.

Defence Case And Evidence:

25. The Replying Affidavit deponed on 24th July 2020 was converted to a Defence. It was the Defence case that the suit is subjudice as there exists another suit to wit Eldoret High Court Civil Suit No. 171/2014 (OS) filed by the 2nd Plaintiff against the Defendant and seeking similar reliefs.
26. The Defendant further avers that the Plaintiff has not proved the ingredients and/or conditions for adverse possession.
27. The Defendant further pleads that he had given the 2nd Plaintiff money to buy her own property after they were evicted from Aldai by her uncle. And that she offered them temporary residence at the suit property so that they could buy their own property.
28. The Defendant further avers she had always visited the Plaintiffs on the suit property or has send her son Collins Creider and her brother Daniel Kiprono Serem, until 26th March 2014 when, the 1st Plaintiff threatened Mr. Creider and Mr. Kiprono with machetes.
29. The Defendant further avers that the 1st Plaintiff had admitted in the Eldoret case Civil suit No. 171/2014 (OS) that she was living on the suit property suit the consent of the Defendant.
30. The Plaintiff entered into an agreement to vacate the suit land within one and half years from 6th January 2020; and that the permission to the Plaintiff's use of her property would then cease.
31. Before the expiry of the period, the Plaintiffs filed the present suit.
32. The Defendant thus prayed for the dismissal of the suit.
33. The Defendant testified as the sole witness in support of her case. It was her testimony that, while adopting her replying affidavit as her evidence in chief that, the 1st Plaintiff was her nephew as a son of her brother, they met him while the 1st Plaintiff was sick and about 18 years old in or about the year 2005 or 2006. The 2nd Plaintiff Raymond's mother was the wife of her late brother whom she had given kshs 200,000/= to buy herself a property but did not. It was her testimony that her late brother approached her to stay on the suit land, and she has given her sisters in law the 2nd Plaintiff money to purchase their own property, before she had purchased the suit property.
34. After she purchased the suit property, the Defendant stated that she returned to Canada and authorized her brother the 1st Plaintiff's father and 2nd Plaintiffs' husband to process the title on her behalf. The witness produced the annexures in her replying affidavit as defence exhibits. After the title was processed the Defendants brother passed on and was buried at the maternal grandfather's home in Aldai and the 2nd Plaintiff remained with the title which she later gave to the Defendant. The Defendant advanced the family money to c construct on her property since they had nowhere to go.



35. The witness narrated the incidence of her son being chased by machetes when he went to harvest trees.
36. On cross – examination, the witness stated she has lived on and off Canada and Kenya from 1972 and from 2000 to 2006 she had lived in the country for about 6 months. She stated that she had sent money to 2nd Plaintiff to purchase property in about 1995 or 1996. She confirmed that the agreement signed by the 2nd Plaintiff was signed at the police station and that the 1st Plaintiff had on 4 occasions chased people she had sent to harvest trees. She did not know the outcome of Eldoret case, but she had not lived on the suit property at all.
37. In re -examination, the witness stated that her late brother was born in Aldai and that she had sent money for construction of the house on the property.
38. After the testimony of DW1, the Defence case equally closed. Parties were invited to file written submissions.

Plaintiffs Submissions:

39. In their submission the Plaintiff have framed the conditions to be proved in adverse possession cases as their issues for determinations and submitted on them.
40. On issue Number 1, the Plaintiff submit that their occupation of NANDI/CHEPTERIT/995 was open, uninterrupted and without consent of the Defendant from December 2002 until 2014, when the Defendant sent people to fell trees. That the property was meant for the Defendants late brother, but the Defendant registered the property in her name.
41. On issue number 2, the Plaintiffs submit that they have lived on the suit property for more than 12 years after the Defendants purchased the property in December 2000.
42. The Plaintiff in support of this submissions cite the decision in the case of Kasuve vs Mwaani Investment Limited and 4 others KLR 184, the decision in Wilson Njoroge Kamau vs Nganga Muceru Kamau [2020] eKLR, as well as decision in Gabriel Mbui vs Mukindia Maranya [1993] KLR.
43. On issue number 3, the Plaintiff submit that they are entitled to L.R. No. Nandi/Chepterit/995 by way of Adverse Possession and have cited the decision in the case of Mtana Lewa v Kahindi Ngala Magandi [2015] eKLR; as they have lived in the suit property uninterrupted, openly for over 12 years since 2000; developed the suit property by constructing over 6 houses and planting trees thereon.
44. On the strength of the above the Plaintiffs submit that they have proven ownership of Nandi/Chepterit/995 by adverse possession and pray for the Court to find and hold so.

Defendants Submission:

45. The Defendant submits mainly on the issue on subjudice. The Defendant submits that the period of the year 2002 to 2014, the Plaintiff were occupying the property with her permissions and only after the 2nd Plaintiff filed the first suit for adverse possession being Eldoret Civil case No. 7/2014 did time start running hence time only ran for 6 years before this current suit was filed.
46. On subjudice the Defendant have cited the decision in the case of Kenya Bankers Association v Kenya Revenue Authority [2019] eKLR and submit for the dismissal of the suit.

Issues for Determination:

47. Upon analyzing the pleadings, the evidence on record, submissions of the parties as well as the authorities cited by the parties, the Court frames the following as issues for determination.



- i) Whether or not the parties herein as relatives, the Plaintiffs can successful claim adverse possession
- ii) Whether or not the Plaintiff have proven the conditions for adverse possession
- iii) Whether or not defence succeeds
- iv) What reliefs ought to issue?
- v) who bears the costs of the suit?

Analysis And Determination

48. At paragraphs 13,14 and 16 of the replying affidavit now turned defence, the Defendant did allude to a relationship between the Plaintiffs and herself.
49. The relationship was confirmed in the testimony of the 1st Plaintiff as PW1, the 2nd Plaintiff as PW2 and the Defendant as DW1. The relationship of the parties as pleaded in the Defence and the testimonies of the witnesses is that as between the 1st Plaintiff and the Defendant there exist a nephew and aunt in relationship and as between the 2nd Plaintiff and Defendant, there exist a sister in law relationship, the Defendant being a half sister to the later Reuben Kiplel, the father of the 1st Plaintiff and husband to the 2nd Plaintiff.
50. The relationship of the parties had a bearing as a preliminary point in this matter as the Courts have repeatedly held that no adverse possession can exist between close relatives.
51. Are the parties herein close relatives?
52. From the pleadings and evidence on record the parties between a nephew and an aunt and sisters in law respectively are close relatives. Neither the Plaintiff to the Defendants have submitted on this issue, but since it arises from the pleadings and evidence on record, the Court has framed the same as an issue for determination.
53. The Court of Appeal had occasion to determine the issue of adverse possession between close relatives in the decision in the case of Samuel Kihamba v Mary Mbaisi 2015 eKLR where the Court held inter alia
- “could the doctrine of adverse possession apply against the parties to the suit before the Learned judge who were related by being mother and step son. We think not, we are persuaded by various dicta which we have quoted and relied upon in this judgement and must state, it would create havoc for families and society generally if the principle of adverse possession applies within families against close relatives.”
54. Similarly the High Court had as far back as in 1993 in the case of Gabriel Mbui vs Mukindia Maranya 1993 eKLR declined to grant adverse possession between relatives, and equally in the case of Rodgers Mwabonje v Douglas Mwabonje 2014 KLR, where the Court took the same view as there is implied consent.
55. This is the position as regards adverse possession between relatives. The Court notes that the Gabriel Mbui vs Mukidi Maranya case 1993 eKLR was cited by the Plaintiff in their submission and wonders whether the Plaintiff's Advocates had read the whole decision, and understood its import.
56. Having found that adverse possession is not permissible between relatives, as in this case, the Court answers issues number (i) and (ii) in the negative.



57. The upshot is that the suit before Court which seeks adverse possession against relatives, must fail and the same is dismissed with costs to the Defendant.

DATED AND DELIVERED AT KAPSABET THIS 25TH DAY OF SEPTEMBER, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Ms. Jeruto for the Plaintiff

2. Ms. Rotich for the Defendant

